Service Provision and Migration

EU and WTO Service Trade Liberalization
and Their Impact on Dutch and UK Immigration Rules

Simon Tans

Service Provision and Migration

EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules

This research was made possible by a grant of the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek* (NWO).

Service Provision and Migration

EU and WTO Service Trade Liberalization and Their Impact on Dutch and UK Immigration Rules

Proefschrift
ter verkrijging van de graad van doctor
aan de Radboud Universiteit Nijmegen
op gezag van de rector magnificus prof. dr. Th. L.M. Engelen,
volgens besluit van het college van decanen
in het openbaar te verdedigen op maandag 30 november 2015
om 14.30 uur precies

door
Simon Jos Tans
geboren op 4 mei 1978
te Leusden

Promotor: Prof. dr. E. Guild

Copromotor: Dr. P Minderhoud

Manuscriptcommissie:
Prof. dr. J. Bast (Justig-Liebig Universität Giessen, Duitsland)
Prof. dr. J.W. van de Gronden
Prof. dr. H.C.F.J.A. de Waele

Lay-out: Hannie van de Put, Hilje Oosterbaan Martinius

Cover: Hilje Oosterbaan Martinius
Printed by Ipskamp Drukkers, Enschede

Contents

Acknowledgements

The verb 'to acknowledge' has various meanings, no less than three of which are relevant to me in relation to my supervisors, professor Elspeth Guild and doctor Paul Minderhoud.

First and foremost I acknowledge that without their knowledge, support and patience I would never have been able to complete this book. Secondly, I recognize the importance and quality of their supervision. That leaves the expression of my gratitude for their role in the process of writing my dissertation. Most of our discussions started with a written paragraph or chapter, yet afterwards left me with a bigger picture. Without emphasis on trivial details, they invariably triggered a more interesting aspect of what I had written, or connected it to other relevant topics. Always in the form of a suggestion, enabling me to write my own work. They are simply unbelievably intelligent and dedicated researchers, as well as lovely people.

Furthermore, I wish to express my gratitude to the members of the Doctoral Thesis Commission, professor Jürgen Bast, professor Johan van de Gronden and professor Henri de Waele. Their feedback improved several arguments as well as the clarity of the conclusions drawn in this book. Hannie van de Put, Hilje Oosterbaan Martinius and Carolus Grütters deserve all praise for managing to turn a lump of almost 200.000 words into something civilized referred to as a book.

Acknowledgement is also due to the Dutch Organization for Scientific Research, de Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO). Its grant made this research possible. It pleases me that I can reward their financial contribution with this book and the outcome of my research.

Two departments of the Radboud University have played a central role in the process of writing my dissertation: The Centre for Migration Law, and the Department of International and European Law. The Centre for Migration Law provided an amazing research environment which has greatly contributed to this work. I wish to thank my colleagues at the Centre for their inspiration and warmth. My colleagues at the Department of International and European Law deserve similar praise. Not only did they contribute to the completion of my dissertation, but also to my development as a lecturer. I am happy to work at a department and university where the quality of lecturing is considered very important. I wish to specifically emphasize the influence of, and examples set by Anne Looijestijn-Clearie and Melissa Hengevelt-Botma They are both clearly five-point lecturers.

In addition to working at these two departments, this research has greatly benefited from my time working as a junior programme officer for the Services Programme and the Dispute Settlement Programme at the International Centre for Trade and Sustainable Development in Geneva. In specific, praise is due to Sheila Sabune for her guidance and for providing the opportunity to participate in various meetings and trainings related to the World Trade Organization. I also had the opportunity to act as a visiting scholar at the Graduate Institute of International and Development Studies in Geneva. I would like to express my gratitude to both Joost Pauwelyn and Vincent Chetail for that opportunity, and for their influence on publications which are now part of this book. Many thanks also to those in Geneva who managed to form a huge circle of friends within a week upon my arrival in the city. They are responsible for turning my planned six month internship into a two year residency.

This acknowledgement would not be complete without emphasizing the role my parents, Carla, Hans and Eiris, my brothers and Tessa have played. You were the direct sufferers, the front line that was exposed too long to my seemingly endless explanations of four fields of law and how they interact. Thank you for enduring. Thanks also to my paranymphs, Eelco and Merlijn, who have been of some help at the time of this writing, yet will be of far more help than they now realize during the coming weeks.

This leaves the indirect sufferers of PhD projects. The ones who often go unnamed. Their suffering could be emphasized by a silent lone tear slowly rolling and finally falling to an unused napkin during an awkwardly silent birthday party. The organizers of a nearly ruined surprise party, as I showed up one week earlier due to a forgotten birth date. Family and friends that were done ages ago with asking when it would be done. As was I. Well, it is done. May the main excuse for social disappointment be well and truly gone.

Nijmegen, 29 September 2015

List of abbreviations

AA	Dutch Aliens Act (Vw 2000)
ACP	African Caribbean and Pacific countries
AD	Dutch Aliens Decree (Vb 2000)
AEA	Aliens Employment Act
Annex MNP	Annex on Movement of Natural Persons Supplying Services Under the General Agreement on Trade in Services
ASEAN	Association of South-East Asian Nations
BV	Business Visitors
CFI	Court of First Instance
CoS	Certificate of Sponsorship
CPC	Central Product Classification
CRD	Citizens Rights Directive (Dir. 2004/38)
CSS	Contractual Service Suppliers
CTS	Council for Trade in Services
DEAEA	Decree Effectuating Aliens Employment Act
DSB	Dispute Settlement Body
DSS	Dispute Settlement System
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECHR	European Convention for the protection of Human Rights and fundamental freedoms
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	Treaty establishing the European Economic Community
ECJ	European Court of Justice
EFTA	European Free Trade Association
ESD	Electronic Service Delivery
EU	European Union
FDI	Foreign Direct Investment

FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
ICT	Intra-Corporate Transferee / Intra-Company Transferee
ILO	International Labour Organization
IMF	International Monetary Fund
IND	Immigratie- en Naturalisatiedienst
ITO	International Trade Organization
LDCs	Least Developing Countries
MFN	Most-Favoured-Nation
MVV	machtiging tot voorlopig verblijf
OECD	Organization for Economic Co-operation and Development
OEEC	Organization for European Economic Cooperation
OTC	Organization for Trade Cooperation
PBS	UK Points-Based System
PPA	Protocol of Provisional Application of the GATT 1947
PSC	Point of Single Contact
PWD	Posted Workers Directive (Dir. 96/71)
QTL	qualification requirements and procedures, technical standards and licensing requirements
REAEA	Regulation Effectuating Aliens Employment Act
RoA	Regulations on Aliens
RTA	Regional Trade Agreement
SEA	Single European Act
S&D	Special and Differential treatment
SD	Services Directive (Dir. 2006/123)
SPS	WTO Agreement on Sanitary and Phytosanitary Measures
TBT	WTO Agreement on Technical Barriers to Trade
TEC	Treaty establishing the Economic Community
TEU	Treaty on European Union

TFEU	Treaty on the Functioning of the European Union
TiSA	Trade in Services Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UKBA	United Kingdom Border Agency
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
US	United States
UWV	Uitvoeringsinstituut Werknemersverzekeringen
VCLT	Vienna Convention on the Law of Treaties
WPDR	Working Party on Domestic Regulation
WPGR	Working Party on GATS Rules
WPPS	Working Party on Professional Services
World Bank	International Bank for Reconstruction and Development
WTO	World Trade Organization

Chapter 1
Introduction

1.1 The consequences of service trade liberalization – problem setting

The aim of this research is to examine the tension between service trade liberalization, the inclusion of movement rights for natural persons to provide services, and the implementation of such obligations into national law. The research centres on service trade liberalization resulting from the World Trade Organization (WTO) and the European Union (EU) and two Member States of both legal orders, the Netherlands and the United Kingdom (UK). Service trade liberalization as provided by the WTO, in specific the General Agreement on Trade in Services (GATS), and the EU includes the right of natural persons to cross borders to provide their economic activity in the host state, in this study referred to as service mobility. The obligations derived from these international legal orders therefore have an impact on the policy area of immigration, influencing the national conditions that determine entry and residence. In addition, the manner in which individuals participate to the economy has changed drastically. While in the 1980s work was primarily understood as a relationship between an employer and an employee, this model has become the exception in many EU Member States.[1] In modern societies, self-employment and service provision are common forms of economic activities. In essence, legal orders are struggling to demarcate employment from self-employment, a problem that becomes particularly evident in relating to hiring-out and the posting of workers. Tensions over security of employment become expressed as part of a discourse regarding disguised employment and the lack of transparency in economic conditions. This tension is exacerbated as workers tend to be nationals of a particular state, whereas mobility related to cross-border service provision primarily concerns nationals from another state. Consequently, international liberalization of trade in service impacts, or in any case is perceived to im-

1 B Hepple, *Social and Labour Rights in a Global Context: International and Comparative Law Perspectives* (Cambridge University Press Cambridge 2002).

pact, on domestic labour market policies. Service trade liberalization therefore has entered the domains of immigration policies and domestic labour market policies. An important function of a sovereign state is the task to determine which foreign citizens may enter its territory. The wider function of immigration law is additionally concerned with the issues that move beyond transit and tourism. 'Immigration control systems' determine access of foreigners to the labour market and the welfare state.[2] These policy areas belong to the core of a state's interests, as they are directly related to the question who belong to one of its constituent elements, its population.[3] Migration law and policy in general is a field of law that is strongly used to find solutions for politically formulated problems. The sensitivity regarding these topics has moreover increased since the emergence of the importance of trade in services in the 1980s, in particular during the first decade of the new millennium.[4] Consequently, societal developments, which determine political aims, have a heavy influence on migration law. Immigrants are perceived as profiting from welfare systems and competing for employment with nationals. The media and politicians more often have a negative than a positive influence on this image.[5] The image itself is certainly debatable;[6] it is also much less relevant in relation to service mobility, which is temporary in nature. In particular in relation to third-country nationals, the influence of such images on the implementation of obligations relating to service trade liberalization is very clear. However, this perception is not limited to third-country nationals. In relation to EU nationals, in particular those whose home states have joined the EU since 2004, similar sentiments in-

2 C Roos *The EU and Immigration Policies. Cracks in the Walls of Fortress Europe?* (Palgrave Macmillan, London 2013), p 1.

3 For a description of population being one of the constituting elements of a state as a person of international law, see: M Craven 'Statehood, self-determination, and recognition' in MD Evans *International Law* (Oxford University Press, Oxford 2014) , p 218-219.

4 Services was considered as an option for multilateral trade during this decade, leading to the creation of the GATS. In parallel, at the end of the 1980s the Single European Act initiated the start of the process towards completion of the EU internal market, culminating in the attempt to horizontally liberalize service provision through the Services Directive.

5 Roos 2013, p 1-2; C Dustmann and I Preston *Racial and Economic Factors in Attitudes to Immigration* (2000) 190 IZA Institute for the Study of Labor Discussion Paper, p 1 and 3-4, available online: <www.iza.org> (last visited 1 October 2015); MJ Trebilcock, R Howse and A Eliason *The Regulation of International Trade* (Routledge London 2013), p 783-784; J Hainmueller and MJ Hiscox 'Educated Preferences: Explaining Attitudes Toward Immigration in Europe' (2007) 61 *International Organization*, p 400.

6 As clearly stated in D Bräuniger 'Debate on Free Movement. Does the EU Need New Rules on Social Security Co-ordination?' (2015) Deutsche Bank Research Briefing European Integration. In the literature, of which only a fraction is listed here, there is clear disagreement: Hainmueller and Hiscox 2007, p 400-402; AM Mayda 'Who is Against Immigration? A Cross-Country Investigation of Individual Attitudes toward Immigrants' (2006) 88:3 *The Review of Economics and Statistics*, p 510-511 and 526; Trebilcock, Howse and Eliason 2013, p 784; GJ Borjas 'The Labor Demand Curve is Downwards Sloping: Re-examining the Impact of Migration on the Labour Market' (2003) 118:4 *The Quarterly Journal of Economics*, p 1335-1374; Dustmann and Preston 2000, p 2-3, 6 and 32-33; N Gaston and D Nelson 'Immigration and Labour-Market Outcomes in the United States: A Political-Economy Puzzle' (2000) 16:3 *Oxford Review of Economic Policy*, p 108; T Hayter *Open Borders: The Case Against Immigration Control* (Pluto Press, London 2000) p 158; RM Friedberg and J Hunt 'The Impact of Immigration on Host Country Wages, Employment and Growth' (1995) 9:2 *Journal of Economic Perspectives*, p 42; GJ Borjas, RB Freeman and L Katz 'How Much do Immigration and Trade affect Labor Market Outcomes' (1997) 1 *Brookings Papers on Economic Activity*, p 62-63; Dustmann and Preston 2000, p 2-3.

fluence politics, and even the legislator of the EU Members States that were included in this study. Dutch and United Kingdom migration law and policy have a tendency to adopt international commitments relating to service mobility within the general framework relating to labour migration. This may be logical from a national perspective for a policy area considered sensitive in the political arena, however, international obligations have an interesting role to play as they restrict the possibilities to unilaterally tighten existing rules.[7] As such, they form a minimum level of guarantees against these changes. There is a clear tension between the interest to liberalize trade in services and the related necessity to address service mobility on the one hand, and the impact service mobility has on immigration and labour market policies. The investigated states demonstrate a strong reluctance to accept binding international commitments in these fields. The adoption of service trade liberalization and the consequential rights of service mobility becomes irreconcilable with the incentive to retain sovereignty over immigration and labour market access, as demonstrated by the EU Member States investigated in this research. The question then is, why do these states involve themselves with trade liberalization involving service mobility.

Providing services is the primary economic activity within the EU. It accounts for the majority of employment opportunities and it is the main driving factor for economic growth. European economies are essentially service-based economies. The core of the European integration project is the creation of an internal market; in relation to services, service providers should be able to provide their services under the same competitive circumstances anywhere within the EU. To ensure competitive equality, or a level playing field, freedom of movement of service receivers is important as well. In parallel, service receivers benefit from the internal market as they have more choice and intra EU-competition should lead to higher quality of services or lower prices. The internal market results in an obligation directed at the Member States. Hindrances to a level playing field, over which Member States exercise influence, should be removed. In the 1990s the liberalization of service trade entered the domain of the WTO. The GATS aims to achieve a similar opening up of service provision at a multilateral level. Consequently, the EU and its Member States participate to intra-state liberalization of service trade both at a regional and the multilateral level. Many services cannot be traded across borders without some form of movement of natural persons. Modern communication technologies provide the possibility to trade in services in a cross-border sense, yet various services still require proximity between supplier and producer. Any international framework dealing with trade in services will have to incorporate ways to

7 GG Lodder *Vreemdelingenrecht in Vogelvlucht. Over Toelating en Verblijf van Vreemdelingen in Nederland* (Sdu Uitgevers, The Hague 2011), p 15; EJA Franssen Wet Arbeid Vreemdelingen (Kluwer, Deventer 2013), p 10-11; G Clayton *Textbook on Immigration and Asylum Law* (Oxford University Press, Oxford 2014), p 31.

accommodate movement of either supplier or consumer across borders.[8] The GATS and EU law therefore include service mobility, the right to travel to, and reside on, the territory of other states party to that international framework. This background demonstrates the inherent tension between service trade liberalization and the reluctance to accept loss of sovereignty over the indicated policy areas which has led to the central question of this research: how do states implement obligations to liberalize service mobility undertaken in a beyond state sovereignty context and how does this influence a state's interest to maintain control over its immigration and labour market policies?

1.2 The background of service mobility

This study addresses the interaction between two international, and two national legal orders. The topics addressed are trade in services, immigration law and access to the labour market regimes. The interaction between these topics and legal frameworks is highly complex and involves trade related, as well as (international) political and social concepts. However, the core of this investigation is based on a legal comparison between the international obligations and the national implementation of these obligations. Before commencing an in-depth analysis of each of these legal orders, this chapter will provide an overview of various relevant topics which set the stage for the research conducted.

1.2.1 The importance of services trade

It is hard to overestimate the importance of trade in services from an economic perspective. Since the 1950s modern economies have changed fundamentally from industry based to service-based economies. This is not to say that services had a small role to play before, yet services were only recognized as a distinct economic category around that time. Services were described as the tertiary sector, agriculture and industry being the first two, which simply covered everything the first two did not.[9] The idea of trade in relation to services on an international level was only picked up by trade economists around the 1980s.[10] Before that time, services were mostly considered non-tradable.[11] In the years since then trade in services has achieved a signif-

8 J Bast 'Annex on Movement of Natural Persons Supplying Services Under the Agreement' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 574-575.

9 V Hatzopoulos Regulating Services in the European Union (Oxford University Press, Oxford 2012), p 3-4.

10 Note that this applies to *trade* economists; services had certainly not escaped the interest of economists in general, JN Bhagwati 'Splintering and Disembodiment of Services and Developing Nations' (1984) 7 *The World Economy*, p 133.

11 US based multinationals convinced the US government of the importance of services trade, Trebilcock, Howse and Eliason 2013, p 472-473; A Sapir 'The General Agreement on Trade in Services: From 1994 to the Year →

icant amount of trade flows. In 2002 services was calculated to account for 72 percent of Global Domestic Product (GDP) in developed countries and 49 percent in developing countries.[12] In 2005 the services sector accounted for 2.4 trillion of the total 12.5 trillion in world exports, turning services exports into the fastest growing sector of trade exports.[13] In 2005 Foreign Direct Investment (FDI) in services had surpassed FDI in manufacturing.[14] Moreover, gains from services liberalization are expected to provide higher gains than liberalization in goods. Protection levels are currently higher regarding trade in services which suggests higher potential for gains.[15] An estimation made in the 1980s on gains from eliminating global restrictions on labour mobility indicates results in a doubling of worldwide annual GNP, and even less optimistic assumptions are still higher than gains from further trade liberalization relating to goods.[16] More recently, Winters states that if developed countries would allow entry of migrants equal to three per cent of the current work population then this would lead to a growth of 150 billion dollar in global GDP.[17] Lifting restrictions would also lead to a much more equitable distribution of wealth.[18] Another important aspect of services, is the significant part they play in the economy.[19] Furthermore liberalization relating to intermediate services leads to positive effects for downstream manufacturing industries.[20] It should be emphasized that services play an important role in human societies and human development as well. Affordable education, water, health and electricity and universal access are crucial factors for equal development in societies.[21]

2000' (1999) 33 *Journal of World Trade*, p 52; WJ Drake and K Nicolaïdis 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46 *International Organization*, p 41.

12 UNCTAD *Trade in Services and its Development Implications* Secretariat Note 20 December 2002 TD/B/COM.1/55.

13 D Fernandes 'Twins, Siblings or Friends: The Conceptual Case of Goods and Services, Where Do We Stand and Where Could We be Headed to?' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 105.

14 *OECD International Investment Perspectives 2005* (OECD, Paris 2005), p 60.

15 P Delimatsis 'Don't Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the *US – Gambling Case*' (2006) 40 *Journal of World Trade*, p 1059-1060.

16 C Hamilton and J Whalley 'Efficiency and Distributional Implications of Global Restrictions on Labour Mobility: Calculations and Policy Implications' (1984) 14(1-2) *Journal of Development Economics*, p 61-75; The Economist 'The Longest Journey' 2 November 2002, p 3 available online: <www.economist.com> (last visited 1 October 2015).

17 LA Winters, 'The Economic Implications of Liberalizing Mode 4 Trade', in A Mattoo and A Carzaniga (eds) *Moving People to Deliver Services* (World Bank,Washington DC 2003), p 59 and 73. See also: B Hoekman and A Mattoo *Liberalizing Trade in Services: Lessons from Regional and WTO Negotiations* (2012) Research Paper Global Trade and Financial Architecture Project, p 28, available online: <http://globalgovernanceprogramme.eui.eu> (last visited 1 October 2015).

18 Trebilcock, Howse and Eliason 2013, p 781-782; Hamilton and Whalley 1984, p 73-74.

19 See for an account on the significance of services in lower and higher developed economies, Fernandes 2008, p 107-108.

20 Examples of service sectors in which spillover effects can be significant are transport, banking and insurances, IT services, advertising and wholesale and retail trading. See for an interesting account on the effect barriers to trade in services have on manufacturing, R Langhammer 'Services Trade Liberalization as a Handmaiden of Competitiveness in Manufacturing: an Industrialized or Developing Country Issue?' (2007) 41 *Journal of World Trade*. See also Fernandes 2008, p 108-109.

21 Fernandes 2008, p 109. These service sectors play a major role in the fierce debate between critics and proponents of liberalization in general and the GATS in specific. Examples of the many publications relating to this debate are: J Woodroffe *GATS: a Disservice to the Poor* (World Development Movement, London 2002), p 34-35; →

Within the European Union growth of the economy has essentially been provided by the services sector. As is often indicated, services now accounts for 70 per cent of the GDP, as well as employment opportunities in the majority of the Member States.[22] Moreover, the services sector continues to grow in importance. 95 per cent of new jobs are created in the services sector, while production in the manufacturing industry shows growth rates of 0.3 per cent over the period 2000-2008. Only 5 per cent of the EU's GDP is derived from cross-border services provision, and services only represents 24 per cent of total EU trade. Improving the internal market in relation to services can still unlock strong potential growth.[23] This importance is recognized at the European level. The Lisbon European Council meeting in March 2000 led to the objective of the EU becoming the world's most competitive and dynamic knowledge-based economy by 2010.[24] The Europe 2020 strategy refers to the three priorities smart, sustainable and inclusive. The smart priority entails an 'economy based on knowledge and innovation'.[25]

The just mentioned figures need to be read carefully. It is hard to find reliable statistical data regarding services. For example, different estimates indicate that services accounts for 54 per cent of the GDP and 67 per cent of employment.[26] While the difference between estimates can be quite profound, the conclusion remains that trade in services is of fundamental importance, not least due to the potential for growth.

1.2.2 Service mobility and development

A considerable number of studies address the development-migration nexus. Various studies relate to the advantages and disadvantages of, in particular high skilled migrants from developing countries to developed countries.[27] The literature on la-

S Sinclair and J Grieshaber-Otto *Facing the facts: A guide to the GATS debate* (Canadian Centre for Policy Alternatives, Ottawa 2002); M Barlow 'The last frontier: GATS' (2001) *Review of African Political Economy* 28:87, p 112-119. Note that the importance of certain services in society leads to limitations relating to the scope and extent of liberalization provided in the GATS (services supplied in the exercise of governmental authority) and the EU (services of general economic interest). This research will not address these services as they are mostly exempted and do not generally relate to the issues at stake when discussing mobility of service providers. See of an excellent discussion in relation to both GATS and the EU: Hatzopoulos 2012a, chapter 2.

22 Hatzopoulos 2012a, p vii; C Barnard *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, Oxford 2013), p 365.

23 Hatzopoulos 2012a, p vii-viii.

24 Lisbon European Council meeting, 23 and 24 March 2000, Presidency Conclusions, par 5; the recognition of the importance of trade in services for the economy is also evident from a European Parliament Background Note used in relation to move ahead with services liberalization within the WTO framework, the so-called Trade in Services Agreement (TiSA), see: W Schöllman *Economic Significance of Trade in Services Background to Negotiations on a Trade in Services Agreement* (2015) European Parliamentary Research Services, p 1, available online: <http://www.europarl.europa.eu> (last visited 1 October 2015).

25 European Commission 'Communication from the Commission, Europe 2020, A Strategy for Smart, Sustainable and Inclusive growth' COM (2010) 2020, final, p 5.

26 Hatzopoulos 2012a, p vii. See further regarding unreliable statistical data: chapter 2, par 2.3.5.1

27 See for instance: T Faist *Transstate Social Spaces and Development: Exploring the Changing Balance between Communities, States and Markets* (2007) 169 International Institute for Labour Studies Discussion Paper, available →

bour migration often includes warnings relating to a so-called brain drain, the movement of skilled workers from developing countries to developed countries. Brain drain leads the home developing State to lose its highly-skilled workers, which amounts to a loss of investment in training the particular worker.[28] On the other hand emigrants also contribute to their home country. While figures provided are estimates, remittances lead to significant benefits for developing countries as a consequence of their trained personnel working abroad.[29] Besides remittances, migration can have other positive effects, often referred to as brain gain or brain circulation. Skilled workers from developing countries migrating to the developed world learn new skills and obtain know-how. Moreover, living and working in a well-functioning market under a democratic system can demonstrate the downside of corruption and the benefits of democracy. These social remittances can influence attitudes at home. Returning migrants will also have obtained trading contacts in the developed world leading to transnational business networks, increasing the possibilities of free international trade.[30] Several theoretical studies confirm the positive effects of brain gain.[31] Moreover, empirical evidence supports these theories indicating that migration does not correlate to a decrease in growth in income per capita in developing countries.[32] The EU indicates that it strives to make migration a positive factor for development and states that it wants to limit brain drain of

online: <www.ilo.org>; LA Winters 'The Temporary movement of workers to provide services (GATS Mode 4)' in A Mattoo, RM Stern and G Zanini (eds) *A handbook of international trade in services* (Oxford University Press, Oxford 2008, chapter 13; Trebilcock, Howse and Eliason 2013, chapter 20; PL Martin, 'GATS Migration and Labor Standards', International Institute for Labour Studies (2006) 165 ILO Discussion Paper, available online: <www.ilo.org>; E Zedillo, P Messerlin and J Nielson *Trade for Development* (Earthscan, London 2005), chapter 4; A Oyowe, 'Brain Drain Colossal Loss of Investment for African Countries' (1996) 159 The Courier ACP-EU Development Magazine, p 59-60.

28 In 2004 the World Commission on the Social Dimension of Globalization, established by the ILO, published a report containing the advantages and disadvantages of migration and globalization: International Labour Organization World Commission on the Social Dimension of Globalization *A Fair Globalization: Creating Opportunities for All* (ILO, Geneva 2004), par 433-438, available online: <www.ilo.org> (last visited 1 October 2015), see for a brief summary of the relevant conclusions of the report: Martin 2006, p 17-18.

29 R Cholewinski 'International Labour Migration' in B Opeskin, R Perruchoud and J Redpath-Cross (eds) *Foundations of International Migration Law* (Cambridge University Press Cambridge 2012), p 296; see for an early study: R Goldfarb, O Havrylyshyn and S Mangum 'Can Remittances Compensate for Manpower Outflows, the Case of Philippine Physicians' (1984) 15:1 *Journal of Development Economics*; Estimates of the International Monetary Fund (IMF) indicate that global remittances relating to 2011 would exceeding a worldwide amount of 483 billion dollar, 351 billion of which flowing to developing countries, D Ratha *Remittances: Funds for the Folks Back Home*, (2012) Finance and Development Web Article, available online: <www.imf.org> (last visited 1 October 2015).

30 Trebilcock, Howse and Eliason 2013, p 783-784. A good example can be found in Chinese return policies, see: Faist 2007.

31 Trebilcock, Howse and Eliason 2013, p 786, fn 31, referring to: A Mountford 'Can a Brain Drain be Good for Growth in the Source Economy?' (1997) 53 *Journal of Development Economies*, p 287; O Stark, C Helmenstein and A Prskawetz 'A Brain Gain with a Brain Drain' (1997) 45 Institute for Advanced Studies Vienna Economics Series 55, p 227, JP Vidal 'The Effect of Emigration on Human Capital Formation (1998) 11:4 *Journal of Population Economics*; P Collier and D Dollar *Globalization, Growth and Poverty: Building an Inclusive World Economy* (Oxford University Press, Oxford 2001), p 82.

32 M Beine, F Docquier and H Rapoport 'Brain Drain and Economic Growth: Theory and Evidence' (2001) 64 *Journal of Development Economics*, p 275.

qualified people.[33] This brief introduction to the advantages and disadvantages of labour migration is relevant to service mobility. Service provision is by definition temporary which entails that this form of movement relates to brain circulation. Leaving the possibility that a temporary service provider switches to an entry scheme relating to permanent migration aside, the issue of brain drain is less relevant in relation to service mobility.

1.2.3 Trade liberalization and labour rights

A connection between trade liberalization and economic and social human rights protection is a much debated subject, centring on the question whether differences related to wages and labour rights form competitive advantages or social dumping.[34] Simultaneously, the issue is directly relevant for national and migrant workers involved as it can be argued that these respectively either suffer unfair labour competition, or exploitation. On the other hand it may be argued that service provision, including through the posting of workers, does not lead to access to the labour market and that the service provider simply should comply with home state legislation.[35] Besides economic and financial cooperation, many states, including all European Member States, limited their sovereignty by signing human rights treaties, offering contractual promises to both the other signatory states as well as their own nationals. The so-called International Bill of Rights consists of the Universal Declaration of Human Rights, which formed the basis of the International Covenant on Civil and Political Rights and the International Covenant of Economic Social and Cultural Rights. These three treaties are part of the United Nations legal order.[36] As these treaties are based on the premise of equality, nationals and non-nationals should be treated equally when they are in an equal position. They do not provide detailed minimum standards relating to labour rights, and in practice states apply these rights with a wide ranging variety. Generally, there is a clear difference between developed and developing countries when it comes to wages and labour protection. As a consequence, there is an ongoing discussion concerning the incorporation of a so-called social clause containing a core of labour standards when States are negotiating trade liberalization. Smaller, but still significant differences exist between the EU Member States, which has led to discussion as

33 European Council, Joint Statement by the Council and the representatives of the Governments of the Member States meeting with the Council, the European Parliament and the Commission, *The European Consensus on Development*, Doc. 14820/05, 22 November 2005, at par 38.

34 See extensively: chapter 4, par 4.2.4.

35 See also: I Lianos and O Odudu 'Introduction' in: I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press Cambridge 2012), p 1-2.

36 HJ Steiner and P Alston *International Human Rights in Context, Law Politics, Morals* (Oxford University Press, Oxford 2000) p 138-139.

well, in particular since the expansion of the EU to Eastern Europe and in relation to the posting of workers.

At the multilateral level, the topic was placed on the agenda by the US before the start of the Uruguay Round; however, it was not included in the Ministerial Declaration that contained the mandate of the negotiations.[37] While not featuring in the Round itself, it was later added to the list of discussion points constructed at the end of the Uruguay Round during the Marrakech Ministerial meeting.[38] The inclusion of new trade topics in the Uruguay Round and the creation of the WTO have rekindled the discussion concerning international trade liberalization and employees rights, which existed long before its inclusion within that context.[39] During the first WTO Ministerial Conference in Singapore in 1996, the discussion focused on the appropriate forum that would deal with the topic international trade and labour law.[40] The official Ministerial Declaration contained a statement that WTO Members renew their commitment to observe international core labour standards. However, the Declaration formally established that the International Labour Organization (ILO), and not the WTO, is the competent body to set, and deal with, these standards, thereby referring the matter to that organization. Furthermore the Declaration stated that labour standards should not be used for protectionist purposes and explicitly recognized the competitive advantage of low wages. Finally the Declaration states that existing collaboration between the WTO and ILO Secretariats will be continued.[41] The subject has resurfaced during the 1999 Ministerial Conference in Seattle and during the Doha Ministerial Conference.[42] The conclusion that the topic of international labour laws should be dealt with by the ILO is confirmed in the Doha Ministerial Declaration.[43] Nevertheless, it

37 S Charnovitz 'The influence of international standards on the world trading regime. A historical overview' (1987) 126:5 *International Labour Review*, p 565; the US proposal itself can be seen as an attempt to reduce the comparative advantage of developing countries.

38 BA Langille 'Eight ways to think about international labour standards' (1997) 31 *Journal of World Trade*, p 30.

39 The topic had already been raised in the 19th century and was included in the preamble of the ILO constitutional treaty, JM Servais 'The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?' (1989) 128 *International Labour Review*, p 423-424; Trebilcock, Howse and Eliason 2013, p 716-717; see for an extensive historical overview: Charnovitz 1987, p 565-566.

40 S Turnell 'Core labour standards and the WTO' (2001) 0103 Macquarie Economic Research Paper, p 5.

41 WTO, Singapore Ministerial Declaration, 13 December 1996, WT/MIN(96)/Dec, par 4. All Ministerial Declarations are available online through the WTO website <www.wto.org> (last visited 1 October 2015).

42 GW Florkowski *Managing Global Legal Systems: International Employment Regulation and Competitive Advantage* (Routledge, New York 2006), p 56.

43 WTO, Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/Dec/1, par 8. The draft Ministerial Declarations of Cancún (2003) and the Ministerial Declaration of Hong Kong (2005) do not refer to the matter, WTO, Draft Cancún Ministerial Text, 13 September 2003, JOB(03)/150/Rev.2; WTO, Hong Kong Ministerial Declaration, 18 December 2005, WT/MIN(05)/Dec. Parallel to this discussion both the EU and the US have concluded labour standards as a condition when granting preferential trade agreements. Regarding the EU Article 50 of the Cotonou Agreement can serve as an example: Partnership Agreement between the members of the African, Caribbean and Pacific group of states of the one part, and the European Community and its Member States of the other part, Cotonou 15 December 2000, entry into force 1 April 2003 OJ (2000) L317/15. The Agreement was revised on the 25th of June 2005 and on the 22nd of June 2010, consolidated version available online: <https://bookshop.europa.eu/en/home> (last visited 1 October 2015). Such treaties can be seen as the counterpart of sanction methods as they provide an advantage when the trading partner respects labour stand- →

is clear that the topic still features within the WTO, confirmation of which can also be found on the WTO website which shows the strongly contrasting views amongst Members.[44] Formally the Singapore Declaration brings closure to the discussion.

Regarding the Singapore Declaration Langille remarks that it should be seen as a form of progress in the trade and labour standards discussion itself. Before Singapore the emphasis was placed on the question whether there was need for debate on the connection between trade and international labour standards in the first place. During the Singapore Round the attention shifted to the question what the appropriate forum for such a debate could be and how the implementation of labour standards could be improved. The question whether there is a need for the debate therefore seems to have been answered.[45] A second important development is the fact that there is more agreement on the substance of the discussion. Both sides have abandoned the more extreme arguments. The competitive advantage of low wage countries has explicitly been recognized while at the same time a commitment to the observance of core labour rights is expressed.[46] Moreover, agreement exists regarding the substance of these core labour rights. This substance consists of the freedom of association and collective bargaining, the prohibition of child labour, the prohibition of forced labour and non-discrimination.[47] On the other hand, the Singapore Declaration does not provide a solution to the problem

ards (and human rights in general), see regarding this topic: Trebilcock, Howse and Eliason 2013, p 717-718. See also E Guild 'Primary Immigration: The Great Myths' in: E Guild and C Harlow (eds) *Implementing Amsterdam. Immigration and Asylum Rights in EC Law* (Hart Publishing, Oxford 2001), p 93.

44 See WTO, Press Pack World Trade Organization 3rd Ministerial Conference Seattle, Briefing Note, 28 November 1999, paragraph on trade and labour standards, available online: <www.wto.org> (last visited 1 October 2015); WTO, Press Pack World Trade Organization 4th Ministerial Conference, Briefing Note, 9 November 2001, paragraph on trade and labour standards, available online: <www.wto.org> (last visited 1 October 2015). See also: Trebilcock, Howse and Eliason 2013, p 717-718; Florkowski examines several WTO provisions to see whether they can serve as legal grounds for Members to react against alleged abuse by setting low labour standards in order to provide domestic companies with a competitive advantage. However, he also lists fundamental problems regarding each possible ground which renders the solutions unworkable, Florkowski 2006, p 57-60.

45 Langille 1997, p 48 and 52. Langille warns that consensus in a forum such as the WTO can easily dissolve. The entire Singapore Declaration should not be seen as consensus, or even grudging compromise as is apparent from the US, EU and Canadian proposals during the Seattle Ministerial Conference.

46 Langille 1997, p 31.

47 Florkowski 2006, p 55; Langille 1997, p 32. These core labour standards have been the subject of earlier ILO conventions and have in 1998 been incorporated in the Declaration on Fundamental Principles and Rights at Work adopted at the 86th ILO conference held in June 1998, Turnell 2001, p 2. The earlier conventions are: Freedom of association and the effective recognition of the right to collective bargaining: ILO convention 87 Freedom of association and protection of the right to organize convention, San Francisco 9 July 1948 and ILO convention 98 Right to organize and collective bargaining convention, Geneva 1 July 1949; The elimination of all forms of forced or compulsory labour: ILO convention 29 Forced labour convention, Geneva 28 June 1930 and ILO convention 105 Abolition of forced labour convention, Geneva 26 June 1957; Effective abolition of child labour: ILO convention 138 Minimum age convention, Geneva 26 June 1973 and ILO convention 182 Worst forms of child labour convention, Geneva 17 June 1999; Elimination of discrimination in respect of employment and occupation: ILO convention 100 Equal remuneration convention, Geneva 29 June 1951 and ILO convention 111 Discrimination (employment and occupation) convention, Geneva 25 June 1958. All these conventions are available online through the ILO website <www.ilo.org> under the heading labour standards and the quick link to the conventions (last visited 1 October 2015).

that lies at the heart of the discussion, how to deal with differences in labour law standards in a world of increasing globalization and liberalization of trade. The 'compromise' that was reached indicates a shift from the momentary insolvable conflict regarding substantial rules (minimum wage, work conditions, maximum work hours) to a human rights based approach of the topic to which agreement does exist.[48] However, without any form of pressure through sanctions, the declaration of renewed commitment does not add much, in particular as the core labour provisions are derived from already existing provisions in fundamental rights treaties.[49] Whether or not the Singapore Declaration is a step forward depends on one's perspective. Florkowski and Turnell emphasize the lack of what they refer to as a real solution. The ILO has so far shown no enthusiasm to act decisively on the creation of a connection between international trade and international labour standards.[50] Moreover, there is, despite the suggestion in the Declaration, no collaboration between the WTO and the ILO.[51] In contrast, Langille focuses on the fact that parties are at least talking, forms of agreement have been reached and the more extreme and unfounded arguments are abandoned.[52] The statement that low wage countries have a legitimate competitive advantage has led to a shift in the discussion towards the following argumentation. The theory of comparative advantages leads to the conclusion that differences in economic development and in political and policy choices concerning social protection forms a source of trade. However, the choices that have been made have to be above an objective threshold. That threshold is formed by the core labour principles to which WTO Members have committed themselves through the Singapore Declaration, which can be seen as objectifying those principles.[53]

The renewed attention to social consequences of liberalization through international treaties has led to the creation of an ILO working party on the social dimensions of the international liberalization of trade. The working group investigates possibilities of connecting trade liberalization and labour standards. However, the efforts of the working group have not been easy due to strong opposition from

48 Langille 1997, p 32.

49 Turnell explains that the original US social clause proposal containing the four core labour rights was based on Article 23 of the Universal Declaration of Human Rights. They are also included in the Covenant on Economic, Cultural and Social Rights (1966), the Covenant on Civil and Political Rights (1966) and the Convention on the Rights of the Child (1989), Turnell 2001, p 5.

50 Florkowski 2006, p 55. A year before the Singapore Declaration, the ILO Director-general has publicly stated that the WTO and not the ILO is the appropriate organization to deal with differences in social protection and the disruptions this causes in international trade.

51 Florkowski 2006, p 55; Turnell 2001, p 6.

52 Florkowski 2006; Turnell 2001; Langille 1997. Langille's article places emphasis on the way the discussion is held.

53 Trebilcock, Howse and Eliason 2013, p 721-722; See specifically regarding this argumentation: MJ Trebilcock and R Howse 'The Fair Trade / Free Trade Debate: Trade, Labour, and the Environment' (1996) 16-1 *International Review of Law and Economics*, p 74; Langille 1997, p 38.

emerging market ILO Members.[54] At this moment the ILO does not provide a substantial solution to the issues relating to liberalization of trade and labour standards, despite the formal referral in the Singapore Declaration. The voluntary nature of the ILO leads that institution to be a useful platform for spreading knowledge, providing education and facilitating dialogue.[55] As a consequence, the issue of labour standards is not addressed centrally within the WTO. The EU has found a solution to this gap through the inclusion of a so-called 'blanket reference' in its horizontal Mode 4 commitment which simply declares that all EU and national requirements relating to work, including regulations concerning minimum wages and collective wage agreements continue to apply.[56]

The manner in which labour standards are dealt with within the EU legal order has consequences at the international level as well. The European regional human rights protection, the European Convention for the protection of Human Rights (ECHR), is part of the Council of Europe, of which all EU Member States are Members.[57] The Member States are also bound by the European Social Charter.[58] Since the entry into force of the Treaty of Lisbon, the EU Charter of Fundamental Rights is binding on the Member States. The Charter contains several provisions concerning social protection, enabling the consideration of social protection in relation to all of the EU's policies and activities. Article 15 of the Charter contains the freedom to choose an occupation and the right to engage in work. Paragraph 3 specifically states that nationals of third countries 'who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.'[59] The consequence is that generally speaking, non-discrimination is effectively ensured to EU nationals providing services, as well as to non-EU nationals relying on service mobility as ensured by the GATS.

54 Florkowski 2006, p 55; see also ILO Governing Body Working Party on the Social Dimensions of the Liberalization of International Trade, Future activities of the Working Party, March 2000, Session 277, GB.277/WP/SDL/1. Summaries of the outcome of these studies (Bangladesh, Chile, Mauritius, South-Korea, South-Africa and Switzerland) can be found in the progress report on the country studies on the social impact of globalization, ILO Governing Body Working Party on the Social Dimensions of the Liberalization of International Trade, Progress report on the country studies on the social impact of globalization, March 1999, Session 274, GB.274/WP/SDL/2. Mauritius can be seen as an example where the increase in international trade and the globalization of markets is put to beneficial use through a stable social policy, see p 52-54.

55 See also Turnell 2001, p 8.

56 World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, horizontal commitment Mode 4, available online: <www.wto.org>. See extensively: chapter 4, par 4.2.4 and chapter 7, par 7.5.3.

57 An overview of the 47 Member States can be found online: <www.coe.int> (last visited 1 October 2015).

58 The European Convention on Establishment and the European Convention on the Legal Status of Migrant Workers are not relevant here. This is due to the fact that they are limited by the principle of reciprocity and the fact that only several EU Member States and Turkey have ratified these conventions. The rights granted on the basis of these conventions are more extensively covered by the Association Agreement with Turkey, and EU law itself, see Guild 2001, p 93; see regarding the Convention on the Legal Status of Migrant Workers: R Cholewinski *The Legal Status of Migrants Admitted for Employment* (Council of Europe Publishing, Strasbourg 2004), p 12-13; see for the signatory states of the European Convention on Establishment: <http://conventions.coe.int/> (last visited 1 October 2015).

59 Lianos and Odudu 2012, p 3.

However, as is evident from the discussion in relation to the social clause, difficulties arise in relation to situations which do not lead to a clear answer to the question whether an equal position exists, for instance, is a temporary service provider to be treated equally in relation to labour standards with domestic workers?

1.2.4 Developments in international service liberalization negotiations

This study concerns the WTO framework and the GATS. The temporal failure to deliver on liberalization at WTO level during the Doha Round negotiation from 2000 to 2015 has led to a gradual shift in negotiations towards trade liberalization at a bilateral and plurilateral level.

The EU participates to various bilateral and plurilateral trade liberalization initiatives in the form of Regional Trade Agreements (RTA) and Free Trade Agreements (FTA), which are modelled on the WTO framework.[60] The outcome of this study is therefore relevant in relation to these initiatives insofar as they concern service liberalization. However, these agreements will not be discussed within the scope of this research.[61] The difficulties to deliver on GATS concessions have also led to negotiations on the Trade in Services Agreement (TiSA). This initiative is currently being negotiated by a group of fifty-one WTO Members, including the EU Member States.[62] The exact constitutional structure of this agreement is still unclear, ranging from a standalone FTA to a plurilateral agreement forming part of the WTO framework the benefits of which are applied reciprocally to the participants only.[63] The participating states do emphasize the importance of an agreement that will first form a preferential plurilateral agreement on services which should in the future be multilateralized fully within the WTO framework.[64]

60 An example can be found in the EU – Ukraine Deep and Comprehensive Free Trade Area, which is part of the Association Agreement between the EU and the Ukraine. Another example is the negotiation of the Transatlantic Trade and Investment Partnership Agreement. Such agreements are beyond the scope of this book. As they are modelled on the GATS, the outcome of this research will nevertheless be relevant to the service mobility aspects of such agreements. See in general: R Baldwin *Multilateralising 21st Century Regionalism* OECD Global Forum on Trade Paper (2014) available online: <http://www.oecd.org> (last visited 1 October 2015).

61 See for a detailed account: Hoekman and Mattoo 2012, p 2. They indicate that little progress in comparison to the WTO Uruguay Round commitments was made in relation to service liberalization. While many preferential trade agreements were made, most do not provide additional market openings. Additionally, no bilateral Agreement between the main WTO Members involved in the WTO deadlock exists.

62 W Schöllman *Economic Significance of Trade in Services Background to Negotiations on a Trade in Services Agreement* (European Parliamentary Research Services February 2015), p 1, available online through the website of the European Parliament: <http://www.europarl.europa.eu/> (last visited 1 October 2015).

63 S Yi Peng 'Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next version of GATS?' *Hong Kong Law Journal* (2013) 43:2, p 614-615.

64 H Godsoe 'The Depth of the Trade in Services Agreement' *Brigham Young University International Law and Management Review* (2014) 10:1, p 12-13; Yi Peng 2013, p 616-617; EU Commission website on TiSA: <http://ec.europa.eu/trade/policy/in-focus/tisa/> (last visited 1 October 2015); Proposal by the European Union 'Plurilateral Service Agreement Draft Text Provisions, Explanatory Note' (2013) available online: <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152687.pdf> (last visited 1 October 2015), draft text provision .

1.3 Research questions

The central question to be addressed in this research is: *how do states implement obligations to liberalize service mobility undertaken in a beyond state sovereignty context and how does this influence a state's interest to maintain control over its immigration and labour market policies?*

To answer this question, several sub-questions will be used as guidance. Answers to the sub-questions will constitute elements of the answer to the central question posed. Firstly, to assess the impact of service trade liberalization on the domestic legal order of the Netherlands and the United Kingdom, it is essential to understand the scope of WTO and EU definitions on trade in services and in particular the extent of obligations derived from the movement of natural persons, or service mobility. The scope of service trade will be assessed *ratione materiae* and *ratione personae*. Defining the scope of trade in services requires a demarcation between service provision and other economic activities addressed by the international legal frameworks. This necessity is moreover derived from the fact that both the GATS and European Union law distinguish those performing labour from those providing services, providing either no mobility rights at all (GATS) or limiting them in relation to certain categories of service providers (EU). Moreover, the distinction between these activities is drawn differently at the national level. As such, the question where the dividing line between labour and service provision should be drawn is closely related to the definition of service provision itself. Underlying this demarcation is the question to what extent the movement of service providers and their employees are a form of labour migration.

Secondly, the question which obligations derived from WTO law and EU law influence a state's immigration and labour market policies needs to be addressed. This in itself requires an overview of the exceptions and justifications of infringements to these obligations. Assessing the impact of international obligations also requires an overview of the enforcement mechanism of the international legal order imposing such obligations.

The third and fourth sub-question investigate the perceived tension demonstrated by the investigated EU Member States. What drives the EU and its Member States to liberalize trade in services at EU and WTO level, while at the same time they resist accepting the mobility rights related to this liberalization? What are the grounds that make these states reluctant to accept loss of sovereignty over their immigration and their access to the labour market policies?

Fifthly, given the demonstrated reluctance to yield sovereignty on the basis of international service mobility obligations, the impact of such obligations requires a detailed scrutiny of the implementation of these obligations in the national legal order of the Netherlands and the UK. As such, an answer to the question how these obligations are implemented will be sought. As this is a legal study, if inconsist-

encies are discovered between international obligations and national implementation, these inconsistencies will be pointed out. This exercise is not a question as such, but it does form an important element of the answer to the question how the international obligations impact on the national legal order.

This leads to the sixth and final sub-question. Having provided an overview of the obligations, the enforcement of these obligations at the international level and the actual implementation of the obligations in the national legal order, it is possible to assess the impact of service mobility provided by WTO law on the one hand, and EU law on the other on immigration and labour market policies in the two investigated states. A comparison answers the question what is required to overcome the identified dichotomy in Dutch and UK policy to liberalize trade in services while seeking to maintain sovereignty over immigration and labour market policies.

1.4 Methodology and explanation of research choices

The liberalization of service mobility is truly a multi-disciplinary research topic. It is first and foremost a form of legal obligations undertaken at the international level. However, the topic of service mobility is much wider than the adoption of international trade obligations. The movement of natural persons to provide services has an impact on immigration law and labour market policies. This makes the topic politically sensitive. It is also economical, as liberalizing trade affects national and regional economies, as well as the global economy. This in turn leads to an effect on international trade and development, which again triggers a political debate, this time at the international level. The discussion relating to the developmental implications of service trade liberalization, remittances, social remittances, brain gain or brain circulation and brain drain form the heart of that discussion at the international level. Additionally, the topic concerns the interaction between international and national legal orders, which is an interesting field of research in itself. The national policy areas involved with immigration and domestic labour markets provide striking examples of a complicated relationship between international law and the domestic legal order. Service mobility therefore draws the attention of socio-legal researchers as well. For instance, service trade liberalization has served as a case study to identify what is required to bridge regulatory differences in legal orders and the role the international legal order has to play.[65] As a final point, at the multilateral level the deadlock in the Doha Round negotiations has led to a move in the direction of bilateral and plurilateral negotiations, which now in-

65 An excellent example is provided by C Arup *The New World Trade Organization Agreements, Globalizing Law through Services and Intellectual Property* (Cambridge University Press Cambridge 2000).

cludes negotiations relating to so-called superregional trade agreements, of which the Transatlantic Trade and Investment Partnership forms a prime example.

It should be clear that this study focuses on the legal aspects of the liberalization of trade in services. It consists of a legal comparison between international norms and national implementation. In addition, this research will focus on the arguments relating to the question why states choose to, or should liberalize trade in services. Consequently, developmental issues and economic arguments have a strong role to play. This however, is not an study based on economic or political science. Due to the complexity of the research and the inclusion of four legal orders, three of which are constantly in flux, it was necessary to limit this research. Besides the limitation to legal science, the study is moreover limited to the movement of natural persons to provide services. Service receivers have mobility rights as well, yet these remain undiscussed. A further justification of this limitation lies in the fact that mobility rights of service receivers have an impact on immigration policies, but not on labour market policies.

The choice of the Netherlands and the United Kingdom as the national orders to investigate effects of service trade liberalization is motivated as follows. Since May 2004, the enlargement of the EU with ten new Member States, eight of which whose nationals temporarily do not have free movement rights as workers, has created a half-way house where it is possible to better observe the effects of service provision and movement of workers in the EU. This in between situation was adopted by the Netherlands, which chose to limit movement rights for workers in relation to eight of the new Member States. The United Kingdom chose to grant full access to the internal market for all of the new EU citizens of the 2004 enlargement. Regarding the 2007 EU enlargement involving Romania and Bulgaria, and the 2013 enlargement involving Croatia, the UK similarly opted to restrict the freedom of movement of workers temporarily in relation to the citizens of these Member States. While limitations are therefore currently applied in parallel with the Netherlands, legislation, case law and literature concerning the eight 2004 Member States does reflect this difference. The chosen Member States may reveal interesting material for comparison of the effect of liberalizing the free movement of service providers.

As indicated, the viewpoint taken in this work is legal. This means that the main exercise, as is clear from the central question and the sub-questions, is a comparison between international obligations and national implementation. As the international obligations are of a higher legal status they should be observed in the national legal orders, incompatibilities should either lead to a correction of the implementation, or a renegotiation of the international obligations. Legally speaking, there is no middle ground.

1.5 Structure

The structure of this book is as follows. This introduction has pictured the relevant background of the research topic. Chapters two (WTO and GATS) and three (EU) will each describe the factors that led to the emergence of the respective international trade regime and the aim it aspires to achieve with service liberalization, the scope of service trade liberalization and the categories of natural persons that may rely on service mobility. An overview of obligations and derogations to those obligations will be followed by a description of the adopted method to ensure that states implement and ensure these obligations. Chapter 4 will draw a comparison between the WTO and the EU which provides necessary insights in the arguments to liberalize trade in services and why the investigated Member States may be reluctant to do so. It also addresses the difference in enforcement mechanisms of the two international trade regimes. The next part of this research (chapters five and six) will provide a detailed overview of the national immigration and labour market rules and policy that applies in general to those who do not benefit from EU law. Within this context, the description of the adopted GATS Mode 4 commitments and their implementation clarifies the changes brought about by the commitments. A review of the implementation of these commitments from the perspective of the international obligations will follow. The same methodology is followed in relation to EU law. The final chapter concludes the research. The perceived dichotomy between the described EU Member States interest to liberalize trade in services and the unwillingness to accept loss of sovereignty over immigration and labour market policy will be explained and analysed. Similarly, an assessment of the legality of national implementation of GATS and EU obligations relating to service mobility will be provided. Finally, the chapter will conclude with the main findings of this study.

Chapter 2

The World Trade Organization and the General Agreement on Trade in Services

2.1 Introduction

This chapter will describe the aim of the World Trade Organization. To understand its main purpose, an account of its creation, including the motivation to liberalize international trade is needed. The method adopted to achieve its purpose includes the General Agreement on Trade in Services. Together with the European Union freedom to provide services, the GATS forms the sources of international obligations investigated in this thesis. The aim of the WTO and the motivations to include the GATS within the WTO framework are vital in understanding the reason why the two investigated states, the Netherlands and the United Kingdom, chose to accept binding commitments involving movement of natural persons. The second purpose of this chapter is to describe the scope of the GATS and the relevant obligations it places on WTO Member States. The extent of such obligations is influenced by the regulatory autonomy provided to WTO Members on the basis of the exceptions to GATS obligations. Consequently, GATS exceptions relevant to the rights of movement of natural persons will be described as well. Fi-

nally, the impact of an international legal order is determined by its method to enforce the obligations derived from it. As such, describing the enforcement mechanisms adopted by the international legal orders discussed in this work are important for the outcome of this research. The chapter will conclude with a summary of the here described topics.

2.2 A brief account of the events leading to multilateral trade cooperation

The choice of a historic departure point is often inaccurate, yet the impact of the First and Second World War on international cooperation, and international trade as a means to reach that cooperation, can hardly be overestimated. The origins of both the WTO and the EU are closely connected to the great wars in the twentieth century, the political, economic and monetary situation prior to their outbreak, and the desire to create lasting peace through international cooperation at the end of both wars.[1]

During the years prior to each of the two world wars, states were locked in intense international economic competition. At the beginning of the twentieth century, in the absence of an international trading regime, economically important states such as the United States (US), Germany and Japan, adopted protectionist trade policies. Intensive economic competition coupled with protectionism and political rivalry ultimately led to the outbreak of the First World War in 1914. In the *inter-bellum* period states again returned to these policies.[2] In response to the setting of high tariffs by the United States,[3] Britain turned away from its long standing policy of free trade and started to create preferential trade agreements within its empire. Other major US trading partners responded with similar measures, raising duties on imports. Soon international trade arrived at an all but standstill.[4] In the 1930s the global economy entered an unprecedented international economic crisis, the Great Depression, which started with the crash of the Wall Street stock exchange in 1929.[5] Moreover, countries widely adopted so-called 'beggar thy neighbour policies'. States started to use competitive devaluations, different ex-

1 Cass indicates that the origins of the WTO predates the twentieth century, DZ Cass, *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford 2005), p 5. Craig and de Búrca point out that the Second World War is important for these forms of international integration, yet they emphase a much longer time-frame. P Craig and G de Búrca EU *Law. Text, Cases and Materials* (Oxford University Press, Oxford 2015), p 2; see also: D Chalmers, G Davies and G Monti *European Union Law* (Cambridge University Press Cambridge 2014), p 4-8.

2 M Trebilcock, R Howse and A Eliason *The Regulation of International Trade* (Routledge London 2013), p 23; Cass 2005, p 7-8.

3 Of which the Smoot-Hawley Tariff Act in 1930 was an extreme example, raising duties on imports to an average of 60%, see Trebilcock, Howse and Eliason 2013, p 23.

4 Cass 2005, p 8.

5 29 October 1929, often referred to as Black Tuesday.

change rates for different countries, trade restrictions, and subsidies to domestic companies to cause economic problems in other states. These policies led to unemployment, external debt crises and the devaluation of currencies. Most commentators agree that the collapse of international trade has significantly worsened the Great Depression of 1929, which can be seen as a contributing factor in itself.[6]

Disruption of interstate relationships was also due to problems relating to the gold standard. On the basis of the gold standard,[7] which was reinstated after the First World War in 1920, the major western currencies were converted into gold at a fixed rate, while other currencies where tied to the same standard by linking with one of those major currencies, in theory leading to a balance of payment equilibrium between states.[8] In practice the Franc was undervalued while the British Pound Sterling was overvalued. This led to economic growth of the US and French economies at the expense of the British economy. Large US capital exports sustained the Franc and the Pound Sterling for some time, however, this changed when these exports seized at the end of the 1920s. Britain responded by suspending gold payments, which lead to hostility. The response of the US was to remove the link between the Dollar and gold.[9]

An additional catalyst to war can be found in the economic and political situation in Germany, which had an almost bankrupted economy and an emerging political party with fascism ideology. Poor national management, reparation payment and a disarmament obligation still following from the First World War and the peace Treaty of Versailles,[10] as well as international reluctance to buy German products provided the National Socialist party with fruitful soil for the gain of political power.[11] The rising tensions between the most powerful nations, the lack of significant international trade and an economic crisis that led to receptiveness of nationalistic rhetoric all lie at the root of the eruption of the Second World War in 1939.[12] These economic, monetary and political tensions are strongly connected and exacerbated each other. The international reaction to both World Wars was to address the tensions at the international level through the creation of international organizations.[13] Not only is there a clear parallel to be found between the devasta-

6 Trebilcock, Howse and Eliason 2013, p 23; Cass 2005, p 8. Historians usually refer to Black Tuesday as the starting date of the Great Depression.

7 The gold standard was established some 35 years before the outbreak of the First World War, which caused its collapse, AF Lowenfeld *International Economic Law* (Oxford University Press, Oxford 2008), p 598.

8 Cass 2005, p 8; Lowenfeld 2008, p 598.

9 An attempt to stabilize the Dollar, Franc and Pound at the London International and Monetary Conference of 1933 failed, Lowenfeld 2008, p 598-599.

10 Signed 11 November 1918, ending the fighting of World War One and requiring Germany to accept full responsibility for causing the war and paying damage compensations.

11 Cass 2005, p 8.

12 Cass 2005, p 8; Lowenfeld 2008, p 599.

13 Some nuance is justified. Ambitious projects, such as the aim to create an international trade organization (now the WTO) and the European integration project (now the EU) require similarly ambitious goals such as the desire to create lasting peace.

tion of war leading to reactions of international cooperation,[14] the reverse is also true. Strained interstate economic conditions prior to both World Wars have contributed to their eruption.[15] Thus, lasting peace and economic growth form two goals which are inextricably linked. As stated by Cass:

> (...) [I]nterstate trade has been, if not synonymous, then closely associated, with the course of war and peace, and the construction of international order. This coincidence is not surprising. International order has long been bound up with the practice of institutions and ideas about democracy and individual freedom, and in many cases trade has been the key vehicle for these changes.[16]

The League of Nations was installed after the shock of the First World War and started out with successful interference in several conflicts as a result of adopted resolutions and exerted pressure.[17] However, these incidents where almost all resolved without the use of force and the League would prove unsuccessful in preventing more powerful threats to peace.[18] Moreover, the US never joined the League of Nations and Germany, the Soviet Union, Italy and Japan were only part of the League for a short time.[19] It was the Second World War that led to the opinion in many countries that a new, stronger and more universal international organization was needed to safeguard peace.[20] Several moves towards integration, the creation of political, economic and monetary institutions and various other initiatives were undertaken with the specific intention to replace the competition which had led to numerous European, and two global wars.[21] Already during the Second World War, the blueprint for the United Nations (UN) was negotiated amongst the Allies and it was signed on 26 June 1945 during the United Nations Conference on International Organization in San Francisco.[22] Similarly, in July 1944 representatives of 44 nations met in Bretton Woods, New Hampshire for a conference dealing with monetary and banking issues.[23] The resulting Bretton

14 Prime examples are the League of Nations after the First World War and the United Nations and the Bretton Woods institutions after the Second World War.

15 Cass 2005, p 7, referring to: N Ferguson, *The Pity of War* (Penguin London 1998).

16 Cass 2005, p 5; similarly: JH Jackson, *The World Trade Organization. Constitution and Jurisprudence*, (Royal Institute of International Affairs, London 1998), p 2.

17 Examples are resolving territorial disputes between Sweden and Finland and later between Turkey and Iraq, the securing of Greek troop withdrawal from Bulgaria in 1925 and the deployment of a small peace-keeping force in a dispute between Colombia and Peru, E Luard *A History of the United Nations. Volume I: The Years of Western Domination 1945-1955* (Macmillan, Basingstoke 1982), p 3-4.

18 The Japanese invasion of Manchuria, the Italian attack on Ethiopia and the annexations of the Rhineland, Austria and Czechoslovakia by Germany, Luard 1982, p 4.

19 Luard 1982, p 10-11.

20 Luard 1982, p 17.

21 Jackson 1998, p 15; Lowenfeld 2008 p 23-24; N Foster *Foster on European Union Law* (Oxford University Press 2013 Oxford), p 4.

22 See for an extensive overview of the negotiations leading to the UN Charter: Luard 1982, chapter 2 and 3.

23 This conference was titled the United Nations Monetary and Financial Conference. While the UN Charter was drafted at the San Francisco Conference in 1945, officially coming into existence through ratification on 24 Oc- →

Woods Agreement led to the creation of two international economic financial organizations.[24] Instead of the traditional measures of currency value reduction and the reduction of government spending, which was said to worsen international economic instability, states could now rebalance payments with the aid of an international institution, the International Monetary Fund (IMF).[25] The second institution, the International Bank for Reconstruction and Development (World Bank) was designed to facilitate the reconstruction of countries affected by war and development of countries which were behind in industrialization.[26]

The plans envisaged by the Allies, in particular advanced by the US and Britain, led to the following structure. The UN was to deal with international politics and security, the Bretton Woods institutions with international banking, monetary and trade issues. Even though the issue of international trade itself was not part of the actual conference, the creation of a third institution, which was later named the International Trade Organization (ITO), was already foreseen.[27] Although the ITO was never realized, on a parallel track, negotiations to create a multilateral agreement to reduce tariffs on trade in goods ultimately led to the creation of the General Agreement on Tariffs and Trade (GATT). Where the UN concern international politics and security issues, the Bretton Woods system and the GATT can be seen as initiatives aimed at preventing the poor economic and monetary conditions of the previous decades.[28] As expressed by the American Secretary of State and Chairman of the Bretton Woods conference during the closing statement:

> First, there must be a reasonably stable standard of international exchange to which all countries can adhere without sacrificing the freedom of action necessary to meet their internal economic problems. This is the alternative to the desperate tactics of the past – competitive currency depreciation, excessive tariff barriers, uneconomic barter deals, multiple currency practices and unnecessary exchange restrictions – by which governments vainly sought to maintain employment and uphold living standards. In the final analysis, these tactics only succeeded in contributing to world-wide depression and even war.[29]

While the international structure was strived at through different initiatives and organizations (the UN and the Bretton Woods institutions), the European integra-

tober 1945, the term itself was already in use by the Allies in 1941, P Sands and P Klein *Bowett's Law of International Institutions* (Sweet and Maxwell, London 2001), p 23-24.

24 Lowenfeld 2008, p 600.

25 Cass 2005, p 9.

26 Lowenfeld 2008, p 600; Cass 2005, p 9.

27 Jackson 1998, p 15-16; Trebilcock, Howse and Eliason 2013, p 23-24; P Van den Bossche and W Zdouc *The Law and Policy of the World Trade Organization* (Cambridge University Press Cambridge 2013), p 76-78; Cass 2005, p 9-10.

28 Jackson 1998, p 15; Lowenfeld 2008, p 24 and p 598-599; Cass 2005, p 9.

29 Proceedings and Documents of United Nations Monetary and Financial Conference, Bretton Woods, N.H., 1-2 July 1947, Vol. I, pp 1117-1118 (1947).

tion would follow a different line, starting with trade integration with the intention to expand with monetary and political integration, all combined within the same organization, which ultimately led to the European Union.[30] An interesting conclusion is drawn by Ruddy in relation to the effect of the international trade regime that is now incorporated in the WTO. Ruddy compares measures taken by states during the 1929 economic crisis with those taken by states during the recent financial crisis which erupted in 2008. Due to the economic efficiency, transparency, enforceability and stability of the current WTO trade system, WTO Members seem to have largely resisted broad protectionist measures.[31]

2.2.1 The International Trade Organization

In 1945 the US Congress bestowed upon President Truman negotiation authority for three years to conclude a multilateral agreement for the reciprocal reduction of tariffs on trade in goods.[32] The negotiations on tariff reduction coincided with the earlier emphasized need to finish the Bretton Woods structure by creating an international trade organization. The first meeting of the United Nations Economic and Social Council led to the adoption of a resolution to create a conference which would draft a charter for this new international organization.[33] The Preparatory Committee met for the first time in London in October 1946 and during conferences held in New York, Geneva and Havana the ideas for the International Trade Organization were shaped around the concepts of non-discrimination and universal rules regulating international trade. Oversight of tariff reduction was to be included as well.[34] As Jackson describes, the meeting in Geneva concerned three different topics, preparation of the ITO Charter, negotiation of a multilateral agreement to reduce tariffs reciprocally, and the drafting of general clauses of obligations relating to tariff obligations. The multilateral agreement and the general clauses later would form the General Agreement on Tariffs and Trade.[35]

30 See extensively chapter 3, par 3.2. Note that parallel organizations were created, in particular the Council of Europe. This organization aims at political integration goals, ensuring democracy, the rule of law and human rights protection amongst its Member States, see the website of the Council of Europe: <www.coe.int> (last visited 1 October 2015).

31 B Ruddy 'The Critical Success of the WTO Trade Policies of the Current Economic Crisis' (2010) 13:2 *Journal of International Economic Law*, p 475-495.

32 The international trade system, as well as the international monetary and political system that emerged after the Second World War, were strongly influenced by the US, Jackson 1998, p 15-16.

33 E McGovern *International Trade Regulation: GATT, the United States, and the European Community* (Globefield Press, Exeter 1982), p 3; Jackson 1998, p 15-16; Van den Bossche and Zdouc 2013, p 76; 1 UN ECOSOC Resolution 13 (1946) UN Doc E/22.

34 Cass 2005, p 10; Van den Bossche and Zdouc 2013, p 76-77; see for a description of the various standpoints of participants in the negotiations regarding the substance under discussion in London, Geneva and Havana: J Odell and B Eichengreen 'The United States, the ITO and the WTO: Exit Options, Agent Slack and Presidential Leadership' in AO Krueger (ed) *The WTO as an International Organization* (University of Chicago Press, Chicago 1998), p 184-187.

35 Jackson 1998, p 16.

Negotiations on the GATT showed good progress, yet during the Geneva conference it became apparent that the ITO Charter would not be finished before 1948.[36] A troubling aspect was that the mandate that had been granted by US Congress in 1945 did not include participation to an agreement establishing an international organization. This led to conflicts with the general clauses part of the GATT containing obligations to refrain from trade-impeding measures as committees of the US Congress considered these too close to implying an organization.[37] The drafting of the ITO Charter was completed and adopted as the Havana Charter during the UN Conference on Trade and Employment in Havana, but after several years passed without the US Congress approving the ITO Charter, President Truman gave up on seeking Congressional approval in 1951.[38] Without the most important economy in the world participating, the other states involved abandoned the project as well. Therefore, the earlier described Bretton Woods system of international economic institutions was lacking its international trade component. Nonetheless, despite the failure of the ITO, the idea for an international organization dealing with trade based on the principle of non-discrimination was born.[39]

2.2.2 The General Agreement on Tariffs and Trade

The GATT 1947[40] can be seen as the by-product of an series of negotiations on tariff reduction. These negotiations took place during the Geneva convention in 1947 at the same time as the drafting the ITO Charter. More than a thousand meetings were held in six months dealing with roughly 50.000 trade items. Mostly the meetings were held one-on-one and dealt with a particular item of trade of which one side was an important producer while the other side was an importer.[41] Lowenfeld explains that these negotiations had three significant consequences for the GATT and WTO trading system that would over time evolve from these negotiations. Firstly, the pace and volume of the negotiations could probably only be reached by bringing together negotiators to the same place at the same time. Thus the Geneva negotiations of 1947 can be seen as the first 'negotiation round', which became practice under the GATT and WTO system. Secondly, concessions that had been agreed upon were applied in accordance with the Most-Favoured-Nation (MFN) principle which required that trade advantages given by a contracting party to another country should be extended to all other contracting parties. This principle would later become a central element of the GATT and the WTO. Thirdly, conces-

36 Jackson 1998, p 16.
37 Jackson 1998, p 16-17.
38 Cass 2005, p 10; Jackson 1998, p 17.
39 Van den Bossche and Zdouc 2013, p 77-78; Cass 2005, p 10.
40 To be distinguished from the GATT 1994, which refers to the version of the GATT that is part of the WTO Agreement.
41 Lowenfeld 2008, p 26-27.

sions were contained in one single document, the GATT, which was flanked with a code of conduct and a common standard of behaviour. This paralleled the commercial policy sections of the draft ITO Charter which was intended as a rudimentary safeguard for implementation of the concessions that had been made and the continued abidance to the rules.[42] From these consequences one can clearly derive initial elements which later became central to the GATT and the WTO trading system.

The GATT was intended to be attached to the ITO Charter, however, it did not suffer the same fate. Agreement on the GATT had been reached during the Geneva conference in October 1947.[43] The GATT aimed at reducing tariff barriers and preventing the creation of new ones. Contracting parties were to meet at regular times to negotiate on the adoption of new concessions, a process based on reciprocity. Combined with the MFN principle, the GATT provided an important and effective mechanism to reduce tariffs.[44] The GATT contained a general abolition of quantitative restrictions coupled with the specification of exceptions.[45] Furthermore a national treatment obligation was included in the Treaty which aimed at preventing protection of domestic products through application of discriminatory internal taxation and regulation of imported products.[46] Amongst other rules, the GATT contained a rudimentary provision on dispute settlement.[47]

However, without the ITO, the GATT applied on the basis of a Protocol of Provisional Application (PPA).[48] Substantive GATT obligations could therefore conflict with national legislation on the basis of that PPA instead of a constitutionally consistent legislative acts. Consequently, the PPA allowed for certain provisions of domestic legislation to remain in existence, so-called 'grandfather rights'.[49] As it was never the intention for the GATT to be structured as an organization, it lacked a secretariat. The Interim Commission for the ITO (which was originally tasked to deal with setting up the ITO as an international organization) picked up the task of functioning as a *de facto* GATT secretariat.[50] Over time some form of institution did start to develop based on provisions such as Article XXV (1) which stated that contracting parties should meet 'from time to time'.[51] Between 1950 and 1965 the GATT was amended several times. During the ninth regular session, which was held between 1954 and 1955, another attempt was made to create an institutional

42 Lowenfeld 2008, p 27.
43 On 30 October 1947 twenty-three countries signed a Final Act authenticating the text of the General Agreement on Tariffs and Trade, 55 UNTS 194; TIAS 1700, McGovern 1982, p 3.
44 GATT 1947 Article 1.
45 GATT 1947 Article 11
46 GATT 1947 Article 3.
47 GATT 1947 Article 22 and 23; McGovern 1982, p 3. The evolution of the dispute settlement system will be discussed in the next paragraph.
48 Geneva, 30 Oct. 1947, in force 1 Jan. 1948: 55 UNTS 308; IV BISD 77; TIAS 1700
49 The GATT Part II would be implemented 'to the fullest extent not inconsistent with existing legislation', GATT BISD, Vol IV,77; Van den Bossche and Zdouc 2013, p 77.
50 Jackson 1998, p 18-19.
51 See also McGovern 1982, p 3; Cass 2005, p 10.

framework for the GATT in the form of an Organization for Trade Cooperation (OTC). However, as with the ITO, the OTC was not approved by the US Congress and was therefore never created.[52] In 1965 the GATT was amended for the last time before its incorporation within the WTO Agreement. The 1965 protocol added a fourth part to the GATT, dealing with trade and development. As expressed in the first provision of part IV, one of the main objectives of the GATT was 'the raising of standards of living and the progressive development of the economies of all contracting parties'.[53] Thus, the linkage between international trade and development was already present before the creation of the WTO.[54]

2.2.3 From GATT to WTO

Despite the absence of a solid framework and institutional provisions, the GATT has been highly successful in reducing tariff levels of the states involved. The GATT effectively functioned as a negotiation platform. The reduction of tariffs was reached through the concept which was already present at the GATT's inception, liberalization rounds in which all Members where negotiating concessions at the same time and place.[55] There have been eight such round including the first Round in Geneva. According to the WTO, world trade in 2000 was twenty-two times the level it was in 1950.[56] While the first five rounds had their focus on tariffs, the Kennedy Round (1962-1967) and Tokyo Round (1973-1979) tried to deal with non-tariff barriers as well.[57] It had by that time become apparent that tariffs were no longer the primary impediment to international trade, non-tariff barriers were becoming more problematic as protectionism started to surface through other methods.[58] The success the GATT had in reducing tariffs could not be reached regarding the reduction of non-tariff measures. Examples of non-tariff measures are numerous, ranging from laws favouring or requiring the buying of national products, to subsidies and discriminatory public procurement rules. The gradual shift in the GATT mandate towards non-tariff barriers entailed a much deeper intrusion into national sovereignty, leading to more resistance from and within the

52 Jackson 1998, p 19.
53 GATT 1947, Article XXXVI (1)a; Jackson 1998, p 19.
54 On development and service trade liberalization, see chapter 1, par 1.2.2.
55 Cass 2005, p 10.
56 See the WTO website: 'The multilateral trading system, past, present and future', available online: <http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm> (last visited 1 October 2015).
57 The following rounds have taken place: Geneva 1947, Annecy 1949, Torquay 1950, Geneva 1956, Dillon 1960-1961, Kennedy 1962-1967, Tokyo 1973-1979 and finally the Uruguay Round which gave birth to the WTO and was held from 1986-1994. The ninth round, which was launched during the WTO ministerial conference in Doha in November 2001 missed the original 2005 deadline. Attempts to conclude the negotiations in 2006, 2007 and 2008 have failed, see this chapter, par 2.5.4.
58 Lowenfeld 2008, p 57-59; Jackson 1998, p 20-21.

states involved.[59] Non-tariff measures are much more complicated to regulate and implement and the lack of an institutional framework made dealing with non-tariff trade barriers even more difficult.[60] The institutional defects also left the GATT non-adjustable to new forms of protectionist measures unrelated to tariffs and quantitative restrictions. The GATT rules contained weakly defined 'grey area' measures[61] which made it difficult to categorize them as clearly illegal or legal. Moreover, as described in the previous paragraph, parts of national legislation could still be maintained contrary to GATT rules due to the existence of grandfather rights. The result was that the GATT contained many loopholes and ambiguities.[62] Jackson describes the GATT legal structure as:

> 'a complex mixture of almost 200 treaty texts (protocols, amendments, rectifications etc.), (...) affected by numerous decisions and waivers of the contracting parties of the GATT acting jointly'.[63]

The Kennedy Round was not very successful regarding non-tariff barriers and the topic reappeared on the Tokyo Round agenda as the primary issue under discussion.[64] During that Round it was decided to deal with the topic through separate codes which would be open to all contracting parties without requiring a certain amount of ratifications in order to become operational.[65] By now the GATT had almost a hundred contracting parties and with the difficulties of the topics under discussion, the code idea provided a solution to the problem of reaching agreement.[66] While the Tokyo Round had for the first time addressed non-tariff barriers,[67] ambiguous language resulting from lack of agreement amongst negotiators made the implementation of the codes difficult. Many of these measures were neither clearly legal or illegal which made them difficult to question.[68] Moreover, the codes considerably added to the administrative and institutional burden, placing strains on the smaller developing countries.[69] Besides implementation problems

59 LR Dawson 'Labour Mobility and the WTO: The Limits of GATS Mode 4' (2013) 51:1 *International Migration*, p 6-7.
60 Van den Bossche and Zdouc 2013, p 78-79.
61 Jackson provides the examples of textiles, autos, steel and computer parts. The issue of trade in textiles has been picked up by the Uruguay Round and the old regime, which allowed for quantitative restrictions that were in conflict with the general GATT rules, has been gradually replaced over a period of ten years by a 'phase out' agreement, Jackson 1998, p 3 and 20.
62 Jackson 1998, p 20.
63 Jackson 1998, p 37.
64 Lowenfeld 2008, p 56-57.
65 These codes addressed the following topics: subsidies and countervailing measures; technical barriers to trade; import licensing procedures; government procurement; customs valuation; anti-dumping; bovine meat arrangement; international dairy arrangement; trade in civil aircraft.
66 Lowenfeld 2008, p 59-60.
67 Jackson 1990, p 4; Jackson 1998, p 20-21.
68 Jackson 1990, p 16.
69 Jackson 1998, p 21-22; The problem of developing countries with their limited resources and staff having to deal with the increasing complexity of the GATT system has only grown with the creation of the WTO. For in- →

and questions concerning the proper dispute settlement procedure, issues arose concerning the legal relationship between the Tokyo codes and the GATT itself.[70] The fact that the GATT was never intended to perform the role as the primary 'institution' in international trade and the difficulties to deal with non-tariff measures made it increasingly apparent that there was a need for a more structural overhaul of the entire GATT system.

An important element in the institutionalization which took place before the creation of the WTO is the gradual emergence of a dispute settlement system. Throughout the history of the GATT the dispute settlement mechanism has evolved from a negotiation and diplomacy approach to a more rule-oriented approach, be it not in a straight line and through combining elements of both methods.[71] Following Jackson's generalization, there were mainly two viewpoints on dispute settlement in the GATT (and now in the WTO), one based on negotiation and diplomacy, the other on a rule-oriented approach.[72] The rule-oriented approach has certain advantages over negotiation. As the outcome may lead to unpleasant rulings for parties involved, it leads disputing parties to focus on the rule and allows predicting what the tribunal will conclude. The system will also lead states to try and prevent violating the rules, which is especially important in the case of economic rules. Entrepreneurs benefit from predictable rules on which they can base their investment and market development decisions. Naturally, the diplomacy approach leads to a less predictable outcome as the dispute is solved through negotiations and compromise.[73]

Originally the issue of dispute settlement was intended to be dealt with by the ITO.[74] Articles XXII and XXIII GATT, providing some rules on dispute settlement, were used to develop a rudimentary but effective forerunner of the WTO dispute settlement mechanism.[75] The evolution of these provisions into the complex system of dispute settlement that would later form the basis of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding, DSU) started with the formation of working parties in the

stance, some authors explain the low level of activity in the dispute settlement system by small developing countries by referring to a lack of skilled staff and resources to deal with the complexity of the WTO legal texts and the increasing amount of dispute rulings, see for instance: H Nordstrom and G Shaffer *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure: A Preliminary Analysis* Issue Paper 2 (ICTSD, Geneva 2007), p v.

70 Jackson 1998, p 22.

71 JH Jackson 'The WTO Dispute Settlement Understanding, Misunderstandings on the Nature of Legal Obligation' (1997) 91 *American Journal of International Law*, p 62.

72 Jackson explains that rule-oriented should be distinguished from rule of law or rule-based system approaches as that implies a form of abidance which could go too far for states involved. On the other hand the formal phrase used is not really relevant, as procedural rules regarding application should provide as much predictability and stability as possible, Jackson 1998, p 61.

73 Jackson 1998, p 60-61.

74 Trebilcock, Howse and Eliason 2013, p 172; Cass 2005, p 10-11; Jackson 1998, p 65-66.

75 Trebilcock, Howse and Eliason 2013, p 172; Cass 2005, p 10-11; Jackson 1998, p 65-66.

1950s.[76] This practice introduced settlement by a forum encouraging negotiation between the involved parties. The emphasis of the procedure was on consultation and reaching consensus, which practically entailed a veto possibility for all Members, including those party to the dispute.[77] The GATT provisions allowed the contracting parties to investigate the dispute and make recommendations and rulings. As a means for redress, the contracting parties had the possibility to grant a Member permission to suspend its concessions under the GATT if 'the circumstances are serious enough to justify such action'.[78] This authorization of suspension was granted only once. Moreover, the US have occasionally suspended their GATT obligations without authorization.[79] Initially these working parties included representatives from the disputing Members, however, from the seventh session in 1952, the contracting parties started to utilise panels based on third party investigation. Moreover, representatives from powerful trading Members such as the UK and US were no longer automatically included in the panel.[80] Panels now consisted of three or five experts instead of government representatives. The use of experts entailed a shift from negotiation and diplomacy towards truth finding and arbitration, a practice that would form the basis of GATT and WTO dispute settlement procedures.[81] Nevertheless, this process was gradual and almost immediately after the creation of expert panels the practice fell into disuse. In the 1960s only six panel complaints were received and no panels were created between 1963 and 1970 at all. Instead, disputes were resolved by consultation and recommendation, practically undoing the earlier indicated shift towards legalistic third party arbitration.[82]

As described above, non-tariff measures were used more frequently and due to the reduction of tariff impediments these became the greater barriers to trade. The dispute settlement mechanism in use was often not capable of dealing with these issues. The 1970s saw a steep increase in panel procedures, many of which initiated by an aggressive US approach towards GATT obligations. Due to declining export and growing import the US Congress was keen on seeing GATT rules enforced.[83] During the Tokyo Round negotiations, an attempt was made to improve the functioning of the dispute panel system. The initiative by a Group Framework Committee, charged with the task, was not very successful partly due to resistance of changes to the existing procedure by the (then) European Economic Community (EEC).[84] The outcome of the attempt, the Understanding on Dispute Settlement,

76 Cass 2005, p 10-11; Trebilcock, Howse and Eliason 2013, p 172-173.
77 Cass 2005, p 11.
78 GATT 1947 Article XXIII (2).
79 Jackson 1998, p 67.
80 Trebilcock, Howse and Eliason 2013, p 173.
81 Jackson 1998, p 66-67; Cass 2005, p 11.
82 Trebilcock, Howse and Eliason 2013, p 173.
83 Trebilcock, Howse and Eliason 2013, p 174.
84 Jackson 1998, p 67.

merely codified existing practice.[85] Matters were not simplified by the lack of clarity on the status of this Understanding. While the Tokyo Round Codes were Treaties, the Understanding was not. Moreover, some of the Tokyo Codes also contained provisions on dispute settlement. Yet the Understanding contained a detailed procedure which would become very influential. Jackson describes it as 'a "definitive" interpretation of the GATT Agreement, binding on all parties by a decision taken by consensus'.[86] Until the establishment of the WTO it formed the framework for dispute settlement.[87] A major shortcoming of the procedure was that the decision to commence panel proceedings had to be taken by the contracting parties (through the Council) by consensus in order to make it binding. This blocking veto possibility was occasionally used, for instance in relation to anti-dumping. Moreover, it led to disputes never brought before the GATT as the complainant suspected the respondent to exercise its veto.[88] This led to critique on the dispute settlement process. The growing use of the system increased the incentive to create a new procedure, contributing to the overall pressure to reform the entire GATT system.[89] As such, the topic of dispute settlement was included in the Punta del Este Declaration, launching the Uruguay Round and setting its agenda, ultimately leading to the WTO Dispute Settlement Understanding.[90]

2.2.4 The Uruguay Round and the creation of the WTO

The above indicated factors, the increasing use of the consensus based dispute settlement system and the inability of the GATT to effectively deal with non-tariff measures, contributed greatly towards an incentive for a more fundamental reform. Negotiations relating to non-tariff barriers are complex and a different institutional framework was required to deal with this topic.[91] After the Tokyo Round, the complexity of the GATT system had grown considerably and the lack of a constitution for the international trade system was increasingly becoming problematic for an effective functioning of the GATT.[92] Additionally the GATT had never been able to regulate measures on agricultural products, in part caused by a 1955 waiver given to the US.[93] Finally, world trade itself was changing. New topics such as ser-

85 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance at the thirty-fifth Session in Geneva in November 1979, 1979 Understanding on Dispute Settlement; GATT, BISD 26 Supp. 216 (1979).
86 Jackson 1998, p 68.
87 Jackson 1998, p 67-68; Trebilcock, Howse and Eliason 2013, p 174.
88 WTO Secretariat *A handbook on the WTO Dispute Settlement System* (Cambridge University Press Cambridge 2004), p 14.
89 Cass 2005, p 11.
90 Jackson 1998, p 68 and 71. See for a list of shortcomings in the GATT dispute settlement process: Jackson 1998, p 71.
91 Trebilcock, Howse and Eliason 2013, p 24-25.
92 Jackson 1998, p 24, see also Cass 2005, p 11.
93 Jackson 1990, p 17.

vices and intellectual property had risen in importance and thus proposals were submitted to include these topics in the GATT system.[94] Existing practice would thereby prove useful as a guiding example, and the combination of rounds with an executive staff in a permanent location and the rudimentary form of institutional structure played an important role in the founding of the WTO.[95] Soon after the Tokyo Round, the US took a leading role to push for a new round with a broad agenda, including trade in services, investment measures and agriculture. A Ministerial Meeting in September 1986 at Punta del Este in Uruguay set out the framework for this new round and the Ministerial Declaration of Punta del Este of 20 September 1986[96] provided a broad mandate for negotiations. Though the topic of services trade was included, this was not without controversy and the Declaration itself contained no certainty of inclusion. However, gradually it became apparent that services would indeed become part of the new trading system.[97]

2.2.4.1 Including trade in services, the creation of the GATS

Trade economists have until the 1970s considered services only in connection to goods. Services were thought ill-suited for separate trade and were mostly ignored.[98] Trade in services was traditionally seen in connection to goods, a rethinking of the concept of services was required to consider services as existing in separate markets.[99] However, between 1970 and 1980 international trade in services grew with a rate of nineteen per cent per year, raising interest in the topic.[100] Several trends may explain this phenomenon. Firstly, modern information and telecommunication technologies greatly increased the possibility to trade services on a cross-border basis. Secondly, during the 1970s and 1980s a regulatory reform trend emerged in many (developed) countries leading to deregulation and the abolition of state monopolies in relation to service industries. Thirdly, services were increasingly separated from goods ('splintering' of services from goods), which made

94 Jackson 1998, p 24.
95 Cass 2005, p 10.
96 GATT, Uruguay Ministerial Declaration, 20 September 1986, available online: <http://www.sice.oas.org/trade/Punta_e.asp> (last visited 1 October 2015).
97 Jackson 1998, p 24-25; Van den Bossche and Zdouc 2013, p 79.
98 As Fernandes notes, definitions in services tend to differ depending on the purpose of the intended application of the definition. An economist, lawyer and businessperson tend to emphasize different aspects, D Fernandes 'Twins, Siblings or Friends: The Conceptual Case of Goods and Services, Where Do We Stand and Where Could We be Headed to?' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 109; A Sapir 'The General Agreement on Trade in Services: From 1994 to the Year 2000' (1999) 33 *Journal of World Trade*, p 51; Trebilcock, Howse and Eliason 2013, p 472. Fuchs indicates that there was one exception when a recommendation on 'Freedom of Contract in Transport Insurance' was issued within the GATT framework in 1959, C Fuchs 'GATS Negotiating History' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 2.
99 Trebilcock, Howse and Eliason 2013, p 472-473.
100 Fuchs 2008, p 2.

them susceptible to trade.[101] The appearance of trade in services within the international trade liberalization framework is strongly due to these trends. At that time services were mostly provided by suppliers originating in industrialized countries.[102] In particular US based service providers started actively lobbying their government to work on the reduction of international barriers to trade in services, as international access to service markets was very limited.[103] The topic of trade in services became part of the Tokyo Round discussions due to the initiative of the US, be it without any outcome. Nevertheless, the idea to address trade in services within multilateral trade negotiations took hold and was further developed during the 1980s.[104]

With the inclusion of services on the Uruguay Round agenda, negotiators preparing the Round were confronted with the issue whether negotiations should strive to incorporate services in the GATT or in a separate agreement. From an economic perspective this issue was separated into two questions: were services sufficiently similar to trade in goods and did negotiators want to deal with both topics in the same context.[105] Before the Round commenced, the opinion among negotiators was that international trade in goods and services were too far apart to simply incorporate services in the GATT. Moreover, especially among developing country negotiators the idea of negotiating on goods and services in one grand bargain met with resistance. Therefore, the Uruguay Round commenced on two separate negotiation tracks leading to two different agreements. Negotiations on services took place within the Group of Negotiating on Services.[106] However, the process of negotiating an agreement on services started from within a negotiation round of the former GATT system. The GATS, as its end result, is based party based on old GATT provisions and concepts.[107]

2.2.4.2 The inclusion of capital and labour

Adding services on the trade agenda led to fierce debates between two principal groups of countries, the so-called Group of Ten, led by Brazil and India, representing developing countries on the one hand, and the developed countries led by the United States.[108] Initially, developing states were against the inclusion of trade in

101 Trebilcock, Howse and Eliason 2013, p 472-473. The concept splintering of services from goods is explained in this chapter, par 2.4.4.1.

102 RJ Self and BK Zutshi 'Mode 4: Negotiating Challenges and Opportunities' in: Mattoo and Carzaniga (eds) A Mattoo and A Carzaniga *Moving People to Deliver Services* (World Bank, Washington DC 2003), p 27.

103 Fuchs 2008, p 2.

104 Fuchs 2008, p 2-3; Trebilcock, Howse and Eliason 2013, p 474.

105 Sapir 1999, p 52.

106 Sapir 1999, p 52; Fuchs 2008, p 4.

107 K Alexander and M Andenas 'Introduction' in: K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 4.

108 Self and Zutshi 2003, p 28; JN Bhagwati 'Trade in Services and the Multilateral Trade Negotiations' (1987) 1:4 *The World Bank Economic Review*, p 549.

services in the GATT framework as they perceived liberalization to lead to a loss of autonomy regarding macro-economic and development policies.[109] In contrast, developed countries sought the inclusion of meaningful portfolio investment. Over time developing countries started to realize that the inclusion of establishment rights regarding services sought by developed countries provided opportunities to include service provision through labour flows into the GATS framework.[110] Moreover, developing countries were starting to open up their services markets autonomously to actively integrate in the increasingly interdependent global economy.[111] The result was the inclusion of both capital and labour, be it restricted to a temporary duration and a specific purpose.[112] The discussion concerning the scope of the new agreement is reflected in the definition of services trade within the GATS, as that definition partly provides the scope of the Agreement. It is important to emphasize that the discussion between, roughly speaking, developing and developed countries, has led to considerable debate within the Group of Negotiating on Services. Defining services touches the blurry and politically sensitive lines between trade in services on the one hand, and immigration and foreign direct investment on the other.[113]

2.2.4.3 The WTO as a new international organization

While the Punta del Este Declaration did include the topics of the functioning of the GATT system and revision of the dispute settlement procedures,[114] the establishment of a new organization was not included. The first official proposal towards the World Trade Organization was submitted by Canada in 1990.[115] In the meantime the negotiation progress was plagued by a disagreement between the US and the EEC in agricultural measures.[116] The December 1990 meeting, initially intended to conclude the Uruguay Round, ended in a failure to adopt the proposed Ministerial Declaration. While the 1990 Ministerial Declaration did not include a

109 Trebilcock, Howse and Eliason 2013, p 472; Fuchs 2008, p 3.

110 WJ Drake and K Nicolaïdis 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46 *International Organization*, p 72-73; Self and Zutshi 2003, p 28; Trebilcock, Howse and Eliason 2013, p 477-478.

111 Self and Zutshi 2003, p 28; Trebilcock, Howse and Eliason 2013, p 477-478.

112 Drake and Nicolaïdis 1992, p 72-73.

113 ATF Lang 'GATS' in D Bethlehem, D MacRae, R Neufeld and I van Damme (eds) International Trade Law (Oxford University Press, Oxford 2009), p 161; Trebilcock, Howse and Eliason 2013, p 781.

114 GATT Punta Del Este Ministerial Declaration: part 1 D subjects for negotiation, and E the functioning of the GATT system.

115 Jackson's 'Restructuring the GATT system' is the outcome of an informal 1989 meeting in which the idea of a new organization had been discussed, providing an excellent insight in the constitutional issues that plagued the old GATT as well as proposed solutions, JH Jackson *Restructuring the GATT system* (Council on Foreign Relations Press, New York 1990).

116 As Jackson explains, earlier lack of agreement at a 1988 midterm review meeting was in part due to the administration change from Reagan to Bush in the US, and a similar change of the EC Commissioner for External Relations. Only when the new administrations were in place could the negotiations move forward, Jackson 1998, p 25-26.

proposal for a new organization, the idea would soon be incorporated in the negotiations. The GATT secretariat under Director-General Arthur Dunkel requested the negotiation groups to submit draft texts on the state of the negotiations. These drafts were bundled in the 1991 Dunkel Text which for the first time included a proposal for a Multilateral Trade Organization.[117] The Dunkel Text would soon prove to be a significant step towards completion of the Uruguay Round. As the text provided insight over the entire spectrum of topics, it provided governments with the possibility to calculate the advantages and disadvantages which agreement to the Uruguay Round would entail. Consensus on the various topics soon began to form on the basis of the text. Of the most important trading powers, the US was the only country that refused to agree on the establishment of a new organization. However, the Bush administration was replaced by the Clinton administration in January 1993, which after an initial pause decided to agree to the Uruguay Round draft text on 15 December 1993 be it on the condition that the name of the new organization would be changed (back) to World Trade Organization. On 15 April 1994 the final Ministerial Meeting was held in Marrakech in Morocco during which the Agreement establishing the World Trade Organization was signed. The Agreement entered into force on the first of January 1995.[118]

2.3 The system of the WTO and the GATS

2.3.1 The WTO Agreement

After the conclusion of the Uruguay Round, the old institutional structure of the GATT has been replaced with the World Trade Organization.[119] The WTO Agreement, or WTO Charter, has only sixteen provisions. The substantive provisions of the Treaty, 558 printed pages and 26.000 with the schedules, commitments and exemptions, are attached in four annexes to the WTO Charter.[120] As such, it has been referred to as an 'umbrella' agreement, containing general provisions that apply to the different legal regimes annexed to it.[121] The additional agreements besides the GATT, the codes from the Tokyo Round which made the GATT trading system increasingly complex, have all been brought together into one legal structure.[122] In contrast with the practice created during the Tokyo Round which al-

117 Jackson 1998, p 27-28, the name for the organization had changed from the initial Canadian suggestion to Multilateral Trade Organization as the EEC thought that name was more fitting.
118 Jackson 1998, p 28-29; Van den Bossche and Zdouc 2013, p 81-82.
119 Agreement Establishing the World Trade Organization, Marrakesh 15 April 1994.
120 The WTO Charter itself deals with issues such as scope, functions, structure, decision making, accession and withdrawal. Substantive provisions and commitments are all contained in the annexes.
121 See for instance: Jackson 1998, p 2.
122 Jackson 1998, p 20-21.

lowed contracting parties to choose which trade topics they wanted to participate in, the Uruguay Round was based on a single package concept. As such, all agreements and 'associated legal instruments' contained in the annexes are integral parts of the WTO Agreement which all WTO Members have to subscribe to.[123] The exceptions are the optional plurilateral agreements contained in Annex 4.[124] The main agreements and legal instruments annexed to the WTO Agreement are the General Agreement on Tariffs and Trade 1994,[125] the General Agreement on Trade in Services, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[126] and the Understanding on Rules and Procedures Governing the Settlement of Disputes.[127] Complementing the GATT, the WTO Agreements on Sanitary and Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) impose certain conditions on non-discriminatory domestic regulations.

Keeping the above described negotiation process in mind, it is not surprising that part of the texts and schedules are inconsistent or ambiguous. However, compared to the previous GATT system, the WTO can be seen as a major improvement. As the WTO Charter was officially approved by all its participating Member States, many of the old GATT constitutional problems have been remedied. The old GATT system suffered from claims stating that it was non-binding or not authoritative due to its provisional application through the PPA, as well as constitutional defects regarding its application in the domestic legal orders, such as the lacking approval of US Congress. The above described grandfather rights, and

123 For an overview, see M Kennedy 'Two Single Undertakings – can the WTO Implement the Results of a Round?' (2001) 14:1 *Journal of International Economic Law*.

124 WTO Agreement, Article II. Jackson 1998, p 37; the optional parts of the WTO regime are contained in Annex 4. Originally this annex consisted of four plurilateral agreements: the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement. The last two of these plurilateral agreements were terminated on 31 December 1997, WTO News 30 September 1997, press/78.

125 The GATT requires the abolition of quantitative restrictions and other types of discriminatory border measures disfavouring the import of goods, while tariffs are lowered by WTO Members if agreement is reached in negotiation rounds. Article II GATT addresses market access restrictions in the form of custom duties and 'other duties or charges imposed on or in connection with importation'. Article XI GATT addresses quantitative import prohibitions or restrictions. Article III GATT addresses domestic regulation, thus measures which apply equally to foreign and domestic products. Examples of these conditions are the requirement that such measures should not be more trade restrictive than necessary to fulfil certain objectives, such as the protection of human health (5:6 SPS and 2:2 TBT), see also: J Pauwelyn 'Rien ne va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS' (2005) 4 *World Trade Review*, p 135; DA Irwin and J Weiler 'Case Comment. Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7:1 *World Trade Review*, p 101.

126 With the TRIPS Agreement negotiators agreed to harmonize the intellectual property regimes with US and a few other industrialized country norms as the focal point, creating rules regarding patents, copyrights, trade secrets, counterfeit goods and similar topics.

127 The other Agreements in the annexes are the following: Agreement on Agriculture; Agreement on the Application of Sanitary and Phytosanitary Measures; Agreement on Textiles and Clothing; Agreement on Technical Barriers to Trade; Agreement on Trade-Related Investment Measures; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994; Agreement on Preshipment Inspection; Agreement on Rules of Origin; Agreement on Import Licensing Procedures; Agreement on Subsidies and Countervailing Measures; Agreement on Safeguards. Annex 3 contains the Trade Policy Review Mechanism.

many problems relating to decision-making authority derived from vague GATT provisions, do not apply to the WTO system.[128] The legal structure is far more effective due to the Dispute Settlement Understanding which provides a procedure no longer based on consensus, and for the first time an implementing procedure was provided, including measures to enforce the implementation of reports through compensation or retaliation.[129] These changes should have consequences for the implementation and effectuating of WTO obligations.[130]

The old governance of the GATT has been replaced by the WTO structure of governance established in Article IV, which has resulted in various changes including the following. The primary organ of governance is the Ministerial Conference, consisting of representatives of all Members, which compares to the organ known under the GATT as the CONTRACTING PARTIES. The Ministerial Conference must meet at least every two years and it has the general task of carrying out all functions of the WTO.[131] The old Council of Representatives has been replaced by the General Council of the WTO. It is responsible for carrying out the tasks of the Ministerial Conference between meetings and all tasks specifically conferred to it in the Charter. The General Council also functions as the Dispute Settlement Body (DSB) and the Trade Policy Review Body.[132] In its role as DSB the General Council does not investigate complaints itself, but creates panels to deal with the dispute.[133] The panel, in case of failure to resolve the dispute informally, refers recommendations to the Council which then decides on the matter on a so-called 'reversed consensus' basis, entailing that the DSB must take a decision unless there is consensus not to take a decision.[134] Under the Dispute Settlement Understanding an Appellate Body was set up, consisting of seven Members. The Appellate Body can be appealed on matters of law.[135] Article IV also establishes three trade councils, dealing with goods (GATT), services (GATS) and intellectual property (TRIPS), each overseeing the functioning of their respective Agreement. The General Council provides general guidance to the trade councils. Trade councils can, and have created subsidiary bodies dealing with a specific topic such as the working group on domestic regulation which is constituted with the task to draft a set of rules (referred to as disciplines) relating to non-discriminatory measures affecting trade in services.[136]

128 Jackson 1998, p 36-37.
129 Jackson 1997, p 62. The DSU will be described in this chapter, par 2.6.1.
130 This discussion will be part of the conclusion drawn in chapter 7.
131 WTO Agreement, Article IV (1).
132 WTO Agreement, Article IV (2-4).
133 Dispute Settlement Understanding Article 2 (1)
134 Van den Bossche and Zdouc 2013, p 206-207.
135 Dispute Settlement Understanding Article 17 (1)
136 Article IV (5-6). The working group on domestic regulation will be discussed in this chapter, par 2.5.4.2.

2.3.2 The objective of the WTO

The WTO aims at preventing protectionism through the liberalization of international trade. By providing a set of rules to reduce trade restrictions imposed by its Members the WTO reduces barriers to trade in order to reach a 'level playing field' for national and international competitors, as well as for international competitors. The preamble of the WTO Agreement indicates the aim to contribute to: 'substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.' Besides rhetoric included in the preambles, the primary provisions ensuring the abolition or reduction of barriers to trade contain this level playing field idea.[137] The WTO also provides a platform for negotiations, for the further reduction of tariff and non-tariff barriers, but also to conclude new disciplines regarding topics not yet (effectively) dealt with in the WTO legal framework. The WTO Agreement comes with its own Dispute Settlement System which and is often heralded as a unique system among international tribunals. The DSU contributes to the WTO objective of providing a peaceful means to settle trade disputes. The central WTO law concepts of national treatment, market access and most-favoured-nation treatment[138] are gradually intended to provide equal competition opportunities. Providing access to domestic markets for foreign competitors is achieved through the removal of measures that place foreign goods, services or service providers at a disadvantage.

2.3.3 The objective of the GATS

According to its preamble the GATS intends to create a multilateral framework of principles and rules for trade in services. The means towards that end are transparency and progressive liberalization through successive rounds of multilateral negotiations. However, the drafters of the GATS realized that liberalization would lead to pressure on national regulatory autonomy as impediments to trade in services take the form of domestic regulation. Therefore, the preamble indicates that the agreement will give due respect to national policy objectives and specifically recognizes the right of Members to regulate trade in services on their territory. Finally, the preamble provides that the development of developing countries and the inclusion of developing countries in services trade are central aims of the GATS. When examining the provisions in the GATS, it is important to keep in mind that

137 See for an excellent explanation and comparison of the GATT and GATS provisions on market access, national treatment and domestic regulation: Pauwelyn 2005.
138 The MFN obligations is explained above at par 2.2.2.

the agreement tries to strike a balance between the right to regulate on the one hand and trade liberalization on the other.[139]

2.3.4 Overview of the GATS

Before discussing the GATS in depth, it is helpful to provide a brief overview of the main provisions and GATS approach towards service trade liberalization. The structure of the GATS differentiates between measures that limit market access for foreign services and service suppliers, on the one hand, and measures that are aimed at public policy objectives, on the other hand.[140] Market access restrictions contained in Article XVI GATS are quantitative in nature and in principle prohibited.[141] Article XVII GATS, the national treatment obligation, indicates that once services or service providers are allowed access to a certain market, they must be treated similar as domestic services or service providers. To do otherwise through discriminatory treatment undermines market access for foreign competitors by distorting competition.[142] It should be stressed that Articles XVI and XVII GATS strive towards market access and national treatment but do not generally impose these obligations. Market access and national treatment apply only insofar as Members have specifically undertaken commitments in their schedules of commitments.[143] Article VI GATS targets unnecessary impediments to international trade caused by non-discriminatory domestic regulations, which is comparable to the SPS and TBT Agreements regarding trade in goods. As it is impossible to categorically classify regulatory interventions as either restricting trade or not restricting trade, Article VI GATS requires the measure in question to be the least-trade restrictive.[144] The rules on domestic regulation are still incomplete, forming the

139 The right to regulate flows from the fundamental international law principle of state sovereignty. Many (international relations) academics indicate that the Peace of Westphalia (1648) can be seen as the birth of the idea of state sovereignty, see for example: JH Jackson *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge University Press, Cambridge 2006), p 57 and 62.

140 P Low and A Mattoo 'Is There a Better Way? Alternative Approaches to Liberalization under GATS', in: P Sauvé and RM Stern (eds), *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000), p 455.

141 The list of market access restrictions included in Article XVI:2 GATS is roughly analogous to these border measures traditionally applied in relation to trade in goods, Lang 2009, p 160.

142 See for this argument concerning national treatment in relation to trade in goods: M Matsushita, TJ Schoenbaum and PC Mavroidis, *The World Trade Organization. Law, Practice, and Policy* (Oxford University Press, Oxford 2006), p 234.

143 The provisions on market access and national treatment only apply to specific sectors and modes of supply depending on a WTO Member's inscribed commitments. This approach is referred to as a positive list approach and links market access and national treatment to progressive liberalization: J Wouters and D Coppens 'GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization' in: K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 212-213; see also: *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (US – Gambling) WT/DS285/R, 10 November 2004, par 6.310.

144 Low and Mattoo 2000, p 455. This division between Articles VI, XVI and XVII is often referred to as a three-pronged approach. Article XVI and XVII target market access restrictions and discriminatory measures while Article VI complements this approach towards effective access to service markets by targeting unnecessary →

subject of negotiations based on a mandate contained in Article VI:4 GATS. In the meantime, Article VI:5 GATS establishes several provisional conditions which apply to qualification requirements and procedures, technical standards and licensing requirements.[145]

Both GATT and GATS ensure equality between competing foreigners through the generally applying MFN treatment obligation. This obligation entails that trade advantages provided to any other state should be provided to all WTO Member States as well.[146] Important exceptions to the MFN obligations are enshrined in Articles V and V^{bis} of the GATS. The GATS is the only multilateral integration treaty relating to trade in services, but this does not mean that it is the only agreement dealing with service trade liberalization. The term 'proliferation' is often encountered when economic integration agreements are discussed. A multitude of such agreements have been signed between the end of the 1990s and the first decade of the new century. One contributing factor to the emergence of such agreements is likely the slow progress in the Doha Round negotiations.[147] To incorporate the reality of bilateral, regional and plurilateral agreements liberalizing trade in services, GATS Article V provides a solution for the clash between a WTO Member's international obligations relating to such international treaties (signed in the past or the future) and the WTO MFN obligation.[148] Article V imposes a set of conditions which have to be fulfilled in order for service trade liberalization agreements to comply with GATS obligations. In brief, such agreements need to have substantial sectoral coverage, essentially meaning that most, but not all service sectors need to be covered by the agreement. Moreover, the agreement needs to address a significant volume of trade. Additionally, sectors where significant trade between its constituting Member States exists, may not be excluded. In essence, these obligations ensure that derogations to the MFN principle are only acceptable in relation to significant service trade liberalization agreements. This prevents an easy circum-

non-discriminatory domestic regulation: G Feketekuty 'Regulatory Reform and Trade Liberalization in Services', in: P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000), p 101; S Zleptnig 'The GATS and Internet-Based Services: Between Market Access and Domestic Regulation' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 397.

145 See regarding these negotiations relating to Disciplines on Domestic Regulation: M Krajewski 'Commentary on Article VI GATS Domestic Regulation' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 179-181; Wouters and Coppens 2008, p 220-253.

146 Article I GATT and Article II GATS. Adopted commitments therefore benefit service providers of all WTO Members. As WTO negotiation rounds are based on reciprocity, this provides effective WTO negotiation results.

147 J Crawford and RV Fiorentino 'The Changing Landscape of Regional Trade Agreements' (2005) No 8 WTO Discussion Paper, p 1, available online: <http://www.wto.org/english/res_e/booksp_e/discussion_ papers8_e.pdf> (last visited 1 October 2015).

148 Cottier and Molinuevo note that both agreements are international treaties, thus the WTO Agreement has no legal supremacy over economic integration agreements, T Cottier and MA Molinuevo 'Article V GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 128.

vention of this important obligation.[149] Moreover, the service liberalization agreement needs to provide for 'the absence or elimination of substantially all discrimination' in the covered sectors on the basis of reciprocity.[150] In addition, GATS Article V[¨◁] allows WTO Members to become party to labour markets integration agreements.[151] This provision applies to agreements in which WTO Members provide the integration of their labour markets to the degree that citizens no longer require residence and work permits when providing labour on another Member's territory. Such agreements are problematic due to the WTO MFN obligation which applies to all types of favourable treatment provided to services and service suppliers of any other country.[152] The European Economic Area and the European Single Market as provided by the EU Treaty fulfil the criteria of Article V[¨◁] which thus provides an exemption from the MFN obligation. Without this provision, integration agreements, such as the Treaty on the Functioning of the European Union (TFEU), would lead to an extension of its rights granted to service providers to all other WTO Member States.[153]

2.3.5 The scope of the GATS

2.3.5.1 Scholarly debate on defining services

As indicated, the scope of the GATS was a sensitive topic within the Group of Negotiating on Services as defining services touches upon immigration and national labour markets, as well as foreign direct investment.[154] Not only has this sensitivity influenced the debate surrounding the creation of the GATS, it has a strong influence on the current interpretation of the GATS provisions and the commitments inscribed in the schedules. Yet, even without these sensitivities, the question as to what constitutes service provision is difficult to answer. The question of what characteristics differentiate services from goods relates to the more fundamental question of a definition for the concept of services itself. Defining services has proven difficult, yet an attempt is necessary for a variety of reasons, some of which relate to an assessment of the rules in the GATS, while others relate to more practical reasons of understanding and working with the rules contained in the GATS.

First, the similarities and differences between the GATT and GATS framework should reflect the similarities and differences between the concepts of internation-

149 GATS Article V(1) under a; See extensively Cottier and Molinuevo 2008, p 130-134.
150 GATS Article V(1) under b; See extensively Cottier and Molinuevo 2008, p 135-136.
151 As noted by Bast, this provision is closely related to the Annex on the Movement of Natural Persons, which will be described in this chapter, par 2.4, J Bast 'Article Vbis GATS' in: R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 162.
152 Bast 2008a, p 162.
153 Bast 2008a, p 153-154.
154 Lang 2009, p 161.

al trade in goods and services.[155] Assessing the manner in which the GATS reflects these differences is useful in several regards. It provides understanding of the current rules and concepts in the GATS. Moreover, it provides a means to determine the successfulness of the innovation of rules on international trade in goods, which was required to create a framework for international trade in services.[156] A related advantage is that this assessment leads to helpful insights for future negotiations on improving existing GATS rules and drafting new rules dealing with concepts in the GATS that have hitherto been undisciplined or are covered by interim provisions.[157] Second, the GATS requires a definition in order to determine its scope. Creating a treaty without clearly defining its subject leads to a multitude of problems. To understand the definitional approach adopted in the GATS, it is helpful to retrace the steps that have led to that approach. As will be demonstrated below, the current definition indeed can and does lead to interpretation problems, exacerbated by the large amount of WTO Members and their differing interests in a certain interpretation. Third, as services and goods were considered too different to create a single agreement incorporating both concepts, the delineation between both forms of international trade has become crucial in determining the applicable rules. Moreover, as will be demonstrated below, there is a need for reliable data on international trade in services. Without clarifying the concept itself such data will not be complete or will be unreliable.[158]

When interest in services trade started to emerge, attempts at definitions have, in the absence of a theoretical framework for trade in services, focused on the contrast of services with goods. Thus often theories on trade in goods were reversely applied in order to conceptualize the idea of trade in services.[159] Often used services characteristics in these definitions include:

- the intangibility or invisibility of services, services are difficult to touch;
- their non-durable, non-storable or transitory character, it is often not possible to store services and therefore to trade services across space and time;

155 As noted by Fernandes, the task of policy-makers, trade negotiators and strategists dealing with the services sector is complicated by the question: 'as to whether the services sector can continue to draw heavily on experiences in the goods sector'. Fernandes 2008, p 106.

156 Trebilcock, Howse and Eliason note that many attempts in economic literature have been made to define the nature of services, the differences between goods and services and the effect these differences have on the application of the neo-classical theory of comparative advantage to trade in services, Trebilcock, Howse and Eliason 2013, p 474.

157 The Uruguay Round was concluded before negotiations regarding the GATS had finished, thus several issues await regulatory completion, see this chapter, par 2.5.4.2.

158 If a certain cross-border transaction is calculated as part of the added value to a certain good in one country, while considered as a separate transaction in another, data derived from different countries will become incomparable and therefore unreliable or incomplete. An example is that some statistics regarding trade performed without a financial middleman does not show up in central bank statistics, see for instance: <http://stat.wto.org/StatisticalProgram/WSDBStatProgramTechNotes.aspx?Language=E#Data_Notes> under V.4 Trade in Commercial Services under the heading 'Coverage and comparability' (last visited 1 October 2015); see also: WTO Council for Trade in Services *Presence of Natural Persons (Mode 4), Background note by the Secretariat*, 8 December 1998, S/C/W/75, par 22-27.

159 GP Sampson and RH Snape *Identifying the Issues in Trade in Services* (1985) 8:2 The World Economy 1985, p 171.

- the simultaneous consumption and production of services, customers participate in the production process;
- heterogeneity, services are usually non standardized and tailored to the customer's needs.[160]

However, exceptions to each of these characteristics can be found.[161] Moreover, despite the fact that these criteria are straightforward, the actual activities involved are not straightforward at all, given the enormous variation of products and forms of delivery in the services sector.[162] More importantly, the nature of services, and the delineation between goods and services tends to shift due to technical and structural change, a process which was described by Bhagwati as 'the splintering of goods from services and services from goods' and the 'disembodiment of services'.[163] The idea behind the notion of splintering is that as economies grow and specialize, the combination of technical change and economies of scale tends to splinter services from goods (a car manufacturer outsourcing the painting of the cars) and goods from services (a musical performance embodied on a compact disc).[164] With disembodiment Bhagwati explains (in 1984) the idea that several services no longer require proximity between consumer and supplier due to technological change in information and communication. Disembodiment of services not only occurs in the above described example of goods splintering from services, but also from services simply being transmitted 'over the wire', either through tele-

160 These often used characteristics differentiating services from goods were summarized in JN Bhagwati 'Splintering and Disembodiment of Services and Developing Nations' (1984) 7 *The World Economy*, p 135-136. See for an early definition based on these characteristics: WE Sasser, RP Olsen and DD Wyckoff *Management of Service Operations, Text Cases and Readings* (Allyn and Bacon, Boston 1978); see also B Hoekman and M Kostecki *The Political Economy of the World Trading System* (Oxford University Press, Oxford 2001), p 238 and Trebilcock, Howse and Eliason 2013, p 474. Others have focused on services changing the condition of a person or a good, P Hill 'Tangibles, Intangibles and Services: a New Taxonomy for the Classification of Output' (1999) 32:2 *Canadian Journal of Economics*, p 427-428; and VA Zeithaml and MJ Bitner *Services Marketing* (McGraw-Hill, New York 1996); Fernandes 2008, p 110; Hoekman and Kostecki 2001, p 239.

161 Trebilcock, Howse and Eliason provide the examples of the tangible nature of an architect's drawing and the non-simultaneous consumption and production of a television program, Trebilcock, Howse and Eliason 2013, p 474. They also provide the example of a lecture outlasting the lifetime of an ice-cream, referring to P Nicolaides 'The Nature of Services' in: PA Messerlin and KP Sauvant (eds) *The Uruguay Round: Services in the World Economy* (World Bank and United Nations Centre on Transnational Corporations New York 1990). However, Nicolaides did not contribute to this book. Nevertheless, the example is helpful.

162 Fernandes 2008, p 109. See for an overview of the variety in service sectors the Services Sectoral Classification List, which distinguishes services into 12 main-categories and about 160 sub-categories, GATT Group of Negotiating on Services, Services Sectoral Classification List, 10 July 1991, MTN.GNS/W/120.

163 Bhagwati 1984, p 136. Bhagwati's paper has a focus on explaining that services are not 'unprogressive', which has to do with providing a counterargument to theories suggesting that the service industry holds little technological and economic progression. Today, the value of the services industry in the economy is general knowledge.

164 Bhagwati 1984, p 136-138. In understanding the idea of services splintering from goods it is helpful to recall the notion that goods and services both are produced by factors of production, where the services of these factors create added value or output. Goods are the physical embodiment of manufacturing services while services are more directly supplied by owners of factors of production to clients. See regarding this notion, Sampson and Snape 1985, p 172.

communication or electronic data transfer.[165] Interestingly, Bhagwati expresses frustration regarding immigration controls which hinder trade in embodied services.[166] The result of processes of splintering and disembodiment is that the concept of service keeps changing. Disembodied services provided by using a good as a medium, such as music, films and literature, are particularly troublesome when trying to find an all-encompassing definition.[167]

A different approach is not to focus on the difference between goods and services but on the way they are supplied. Thus the central question becomes the difference between *trade* in goods and *trade* in services. Bhagwati's approach allows a division between services trade that requires proximity between consumer and supplier, and services trade that does not require such proximity.[168] Sampson and Snape use a similar classification, focusing on 'how and where' services are produced and traded instead of on physical characteristics. They divide international trade in services into four categories based on whether producer or receiver requires movement.[169] Sapir and Winters provide an approach based on the forms in which services can be provided which is related to the physical location of provider and consumer. A modification of that model has later been incorporated in the GATS.[170] A classification based on the physical location of provider and consumer can be used to identify and divide policies restricting trade in services into those that restrict services and those that restrict the movement of either production factors or receiver. Where services trade does not require proximity, such as tele-

165 Bhagwati 1984, p 139-140. Technological changes have led to this form of services trade and that this can happen again in the future, Trebilcock, Howse and Eliason 2013, p 474-475; Hoekman and Kostecki 2001, p 238; Services are closely connected to technology, Fernandes 2008, p 109. Although the requirement of proximity certainly is a distinguishing element between goods and most services, it provides a different answer to the question: 'what is a service', as the focus lies on a *current* element of many, though not all services, which is the requirement of proximity, such as the service provided by a hairdresser. Yet, technology has changed that requirement for several services. Perhaps technology will one day make it possible that the classical example of hairdressing as a service requiring proximity between consumer and producer, will develop into a service of providing haircut models designed by a hairdresser and executed by the personal house robot.

166 Bhagwati 1984, p 141-142.

167 Trebilcock, Howse and Eliason 2013, p 475. While the selling of a CD is considered as a goods transaction, there is little doubt that the actual payment does not concern the disc but the musical service performed and recorded on that disc.

168 Bhagwati 1984, p 140-141. Targeting reluctance among developing countries to support US ideas of liberalizing trade in services, he argues (in 1984) that services that do not require proximity provide beneficial opportunities. Especially more advanced developing countries with a surplus in skills may find new comparative advantages by liberalizing wire transmission of skilled services trade.

169 The four identified categories of international services trade are: transactions without movement or 'separate services' (referred to as disembodied services by Bhagwati), transactions where the production factor moves, transactions where the receiver moves and transactions where both factors of production and receiver move to a third country. Instead of consumer, they use the term receiver which relates to persons, commodities and resources, Sampson and Snape 1985, p 172-173.

170 A Sapir and C Winter, 'Services Trade' in: D Greenaway and LA Winters (eds) *Surveys in International Trade* (Blackwell, Oxford 1994). Article I:2 GATS, see this chapter, par 2.3.5.2; Fernandes 2008, p 111. The use of proximity as an element to classify trade in services is therefore now used by many authors writing on trade in services, see for instance: Sapir 1999, p 52; Hoekman and Kostecki 2001, M Djordjevic 'Domestic Regulation and Free Trade in Services – A Balancing Act' (2002) 29 *Legal Issues of Economic Integration*, p 306; T Warren and C Findlay 'Measuring Impediments to Trade in Services' in in P Sauvé and RM Stern (eds) GATS 2000, New Directions in Services Trade Liberalization (The Brookings Institution, Washington DC 2000), p 58.

communications services, it is akin to cross-border trade in goods, thus allowing for the application of trade theories on goods.[171] However, when consumer and supplier need to be present at the same place and at the same time, some form of movement of persons is required. Categories of trade in services requiring movement cannot be addressed by theories assuming immobility of production factors or of receivers between countries.[172] As this is often the case, most trade in services involves a different mode of supply than trade in goods.[173]

Trebilcock, Howse and Eliason suggest a closely related solution to the definitional problems that arise when searching for an all-encompassing definition of services. They propose to concentrate on the purpose of creating trade rules on services which is the reduction of barriers to trade not covered by rules designed to liberalize trade in goods.[174] The identification of certain often applying characteristics in order to reduce these barriers, is a useful approach when adopting international rules designed to liberalize trade in services without requiring a clear definition of the term services itself. Barriers can be categorized into those that restrict services *per se*, those that restrict movement of factors producing services and those that restrict receivers of services.[175] Often occurring barriers mainly relate to the first two forms of barriers, a high degree of domestic regulatory control and restrictions relating to the free movement of capital and labour.[176] However, this method will lead to its own definition problems as some non-services industries can be said to share these characteristics with services industries.[177]

The adoption of the classification based on the physical location into the GATS could very well be the result of the earlier described difficulty in finding an all-encompassing definition for services.[178] As will become apparent when considering which definition of services was adopted in the GATS, barriers to trade in services are often connected to the four modes of supply identified in GATS Article I:1, restricting either movement of data and money, the establishment of a commercial presence or the movement of people.[179] While barriers to trade in services that do

171 Sampson and Snape 1985, p 174; Sapir 1999, p 52.
172 Sampson and Snape 1985, p 173-174.
173 Sampson and Snape 1985, p 172; Sapir 1999, p 52; Hoekman and Kostecki 2001, p 238.
174 Trebilcock, Howse and Eliason 2013, p 474-475 who state: 'Many barriers to trade in services relate to the modes of supply characteristics of service industries.'
175 A categorization adopted by Sampson and Snape 1985, p 173 which demonstrates the close relationship between their method and the suggestion made by Trebilcock, Howse and Eliason.
176 The fact that services are often highly regulated can itself be explained by certain characteristics that apply, in particular, to the industrial organization of services: 'services markets are intrinsically imperfectly competitive due to informational imperfections about the characteristics of services at the time of purchase' and they often play a key role in the economy. See Sapir 1999, p 52-53.
177 Trebilcock, Howse and Eliason 2013, p 475.
178 Fernandes 2008, p 111.
179 Trebilcock, Howse and Eliason 2013, p 475-476. Examples given are: commercial presence and restrictions to foreign direct investment, movement of people and immigration restrictions, restrictive licensing and certification requirements, movement of money and exchange and capital movement controls and movement of data and restriction of cross-boundary data flows. Another set of restrictions, recognized in GATS Articles VIII →

not require proximity show common features with trade in goods, thus allowing for the application of disciplines that apply to trade in goods, the 'versatile and multi-faceted' characteristics of the service sector and the manner in which technology tends to shift these characteristics may require a rethinking of the perception as to what constitutes a service.[180] Nevertheless, it seems that, based on the same arguments, the GATS drafters only provided a definition of what is meant by trade in services, which should be precise enough to incorporate all modes for trade in services.[181] Thus, regarding specific service sectors clarification of the concept might be required, in general the definition adopted is adequate for its purpose.

2.3.5.2 GATS's definition of trade in services and the modes of supply

As indicated above, the GATS does not provide a definition of the concept of services itself.[182] Instead Article I:1 states that the Agreement applies to 'measures by Members affecting trade in services.' Therefore, the scope of the GATS is determined by the following concepts: 'measures by Members', 'affecting' and 'trade in services'.[183] Moreover, from this definition it becomes apparent that the GATS does not regulate trade in services itself, rather it aims at regulating those measures by Members that have an influence on trade in services. This approach signifies the emphasis on reducing barriers to trade in services which result from governmental regulation.[184]

Measures by Members

Article I:3(a) GATS provides a wide coverage to measures taken by governments. As regulations taken at all levels of government can influence trade in services, the criterion 'measures by Members' includes central, regional and local governments

(dealing with monopolies) and IX (dealing with business practices restricting trade in services, such as cartels), relate to competition policy such as access of providers or consumers to a network and essential facilities.

180 Fernandes 2008, p 109.

181 R Leal-Arcas 'The GATS in the Doha Round' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 35 and 39.

182 Defining trade in services by stating that such trade is the supply of a services through one of the four modes is circular. Similar: M Krajewski *National Regulation and Trade Liberalization in Services. The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International The Hague 2003), p 42 and Trebilcock, Howse and Eliason 2013, p 482.

183 The Appellate Body, in *Canada – Automotive Industry* held that two key legal issues must be examined to determine the phrase 'affecting trade in services', first whether there is 'trade in services' in the sense of Article I:2 GATS and second whether the measure in issue 'affects' such trade within the meaning of Article I:1, *Canada – Automotive Industry*, AB Report, par 155. While certainly important in determining whether Members are in violation of their specific commitments, the schedule of commitments is not relevant in determining the scope of the GATS itself. *In Canada – Automotive Industry* the Appellate Body stated that: 'the determination of whether a measure is, in fact, covered by the GATS must be made before the consistency of that measure with any substantive obligation of the GATS can be assessed'. *Canada – Certain Measures Affecting the Automotive Industry* (Canada - Autos) WT/DS139/AB/R, WT/DS142/AB/R, 31 May 2000, par 150-152; see also Krajewski 2003, p 62.

184 Krajewski 2003, p 62.

and authorities.[185] Moreover, the definition applies to measures of non-governmental bodies taken in the exercise of powers delegated by central, regional or local governments or authorities.[186] While measures taken at some level of the government should not provide too many difficulties, a more troubling issue is whether the concept of delegated powers is to be understood in a formal or a functional sense. As explained by Trebilcock, Howse and Eliason, if a formal approach is applied, countries adopting self-regulating approaches will cause an 'arbitrary asymmetry of obligations'.[187] On the other hand, Krajewski emphasizes that the wording in Article I:3(a)(ii) GATS suggests a narrow view as it specifically refers to delegated powers. Thus without an express delegation of regulatory power the GATS should not apply to non-governmental bodies. If however, the self-regulating authority is factually controlled by the government, measures of the self-regulating authority would come within the scope of the GATS through Article I:3(a)(i) GATS.[188] Additionally, Article I:3 provides that Members must take 'reasonable measures' to ensure that all regulatory entities described in this provision observe its obligations and commitments under the Agreement.[189] The form of a measure is irrelevant and the GATS provides the non-exhaustive examples of law, regulation, rule, procedure, decision and administrative action.[190]

In defining the limits of the term measures by Members it is useful to apply GATT case-law regarding non-violation complaints, in specific, rulings relating to whether an omission or a private action could be regarded as a government measure.[191] The Appellate Body confirmed GATT case-law in which a mere omission could constitute a measure.[192] However, a careful approach is required. Krajewski

185 Krajewski provides the examples of 'independent regulatory commissions or other public entities empowered with regulatory competence' as authorities outside the governmental structure, Krajewski 2003, p 63.

186 Bodies with delegated powers include private self-regulating professional associations such as a lawyers bar association.

187 Trebilcock, Howse and Eliason 2013, p 481-482. Thus self-regulation through a commercials code commission would be exempt from the GATS, whereas measures regulating commercials adopted by authorities exercising governmental power would fall within the scope of the GATS.

188 Krajewski 2003, p 63.

189 As explained by Krajewski, ensuring compliance of sub-central and non-governmental entities to international law is based on general international customary law, see for a more thorough explanation, Krajewski 2003, p 64.

190 Article XXVIII(a) GATS. Analogous application of the Panel ruling regarding the term measures in Article XI GATT would lead to the conclusion that measures extends beyond legislative and administrative actions, thus including fiscal activities, see *Japan – Trade in Semi-Conductors (Japan – Semi-Conductors)* L/6309 – BISD 35S/116, 4 May 1988, par 106. As explained by Krajewski, and as is apparent from Article XIII which only exempts government procurement from Articles II, XVI and XVII of the GATS, government procurement falls within the scope of the GATS, Krajewski 2003, p 64.

191 Interpretations relating to the term measures by Members in the provision concerning a *non*-violation complaint define the limit of the term measure by a Member in Article I:3(a) GATS and can thus be applied to that provision. See for a thorough explanation regarding the requirement of a measure by a Member for non-violation complaints under the GATS: AEM Al-Kashif 'GATS's Non-Violation Complaint' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 519-527.

192 *German – Import Duties on Starch and Potato Flour* W.9/178 – 3S/77, 16 February 1955, par 2 and 5, which was settled during procedures. The idea of an omission constituting a measure was confirmed in *United States* - →

provides the example of a government not proceeding and deciding on a foreign service provider's request for a licence. Seeing as Article VI:3 GATS only requires prompt information regarding the status of an application, it would be difficult to require a decision itself from a slow administration.[193] The question of attributing private actions to the government under the GATS could be answered by analogous interpretation based on the approach adopted under GATT case-law. As such, under certain circumstances private practice following non-binding recommendations and voluntary private practice to obtain an advantage could be attributed to the government.[194]

Trade in services

Article I:3(b) and (c) GATS indicate that for the purpose of the agreement the concept of services includes 'any service in any sector except services supplied in the exercise of governmental authority'. Services supplied in the exercise of governmental authority entails: 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers'.[195] The GATS applies to those measures that affect *trade* in services, therefore measures that affect services without affecting trade are not covered by the Agreement. Article I:2 GATS provides a categorization based on four forms of international trade in services, the so-called modes of supply. Trade in services is defined as the supply of a service through one of the following modes:

> Mode 1: Cross-border, the supply of a service from the territory of one Member into the territory of any other Member whereby both consumer and supplier remain in their own country. Examples are telephone calls across borders and databank services provided to a consumer in another country.
>
> Mode 2: Consumption abroad, the supply of a service in the territory of one Member to the service consumer of any other Member. Thus the consumer

Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan (US – Corrosion-Resistant Steel Sunset Review) DS244/AB/R, 15 December 2003, par 81, see Al-Kashif 2008, p 526-527.

193 Krajewski 2003, p 65.

194 These circumstances would require 'a high likelihood of compliance due to sufficient incentives and disincentives caused by, *inter alia*, a high degree of governmental involvement in the economy, close collaboration between government and business or consensus and peer pressure.' Zdouc 1999, p 305, referring to *Japan – Trade in Semiconductors*, par 154-155, *Japan – Restrictions on Imports of Certain Agricultural Products* L/6253 – 35S/163, 2 February 1988, par 242, *European Economic Community – Regulation on Imports of Parts and Components (EEC – Parts and Components)* L/6657 37S/132, 16 May 1990, par 197.

195 Note that Members are increasingly privatizing governmental services, Van den Bossche and Zdouc 2013, p 338-339. Furthermore, paragraph 2 of the Annex on Air Transport Services states that the GATS does not apply to traffic rights, however granted or services directly related to the exercise of traffic rights. Paragraph 3 states that the GATS does apply to aircraft repair and maintenance services, the selling and marketing of air transport services and computer reservation system services.

travels to the country of the supplier. Examples are tourism, educational services and health care abroad.

Mode 3: Commercial presence, the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member. Examples are banks or insurance companies that provide their services through a branch office established on the territory of another Member.

Mode 4: Presence of natural persons, the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. Examples are information technology specialists posted on the territory of another Member or architects, lawyers or consultants that provide their services in person across borders.

Modes of supply can exchange and supplement other modes. The same services can be supplied through modern methods of communication (Mode 1) or in person (Mode 2 and 4). Commercial presence (Mode 3) is difficult to imagine without transferring key personnel to the host country (Mode 4).[196]

The definition of trade in services is much broader than the concept used for trade in goods. Besides cross-border transactions and trade between residents and non-residents, services trade includes local sales by foreign affiliates (Mode 3), a form of trade that is not included on the account of balance of payments.[197] As said before, services supplied in the exercise of governmental authority, thus supplied neither on a commercial basis, nor in competition with one or more service suppliers, are excluded from the scope of the GATS. The type of services excluded from the GATS by this provision plays a crucial role in the political debate surrounding the GATS as this concerns many essential services such as the provision of water, electricity and public transportation.[198] However, as pointed out by Krajewski, the use of the term in WTO practice is inconsistent. As the constituting elements 'commercial basis' and 'competition' are not elaborated upon in the GATS, and the terms are used inconsistently in WTO practice, Krajewski provides an explanation of the terms based on the context of the agreement and in analogy with similar concepts used in the GATT.[199] Commercial basis almost certainly relates to profit-seeking activities. Competition can be said to exist when two service suppli-

196 Lowenfeld 2008, p 121-122; Martin 2006, p 1.

197 Sapir 1999, p 53; G Karsenty 'Assessing Trade in Services by Mode of Supply' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000), p 34; Hoekman and Kostecki 2001, p 251.

198 Krajewski 2003, p 68. See also chapter 1, par 1.2.1.

199 Krajewski 2003, p 68; see for a more extensive discussion A Arena 'Revisiting the Impact of GATS on Public Services' in M Krajweski (ed) *Services of General Interest Beyond the Single Market* (T.M.C. Asser Press, The Hague 2015), p 29-33.

ers provide the same service for the same group of consumers. However, this definition provides a new problematic element: how does one determine whether services are to be considered similar services. This issue raises similar questions as the element 'likeness'. Krajewski suggests that an analogy with the distinction between likeness and competitiveness in Article III:2 GATT can be useful. To be exact, Krajewski suggests that the notion competition in Article I:3(c) GATS should be interpreted in a similar way as 'directly competitive and substitutable products'.[200] As determined in GATT case-law, 'the decisive criterion in order to determine whether two products are directly competitive or substitutable products is whether they have common end uses, *inter alia*, as shown by elasticity of substitution'. Whether such elasticity exists and how large it has to be must be determined on case by case basis.[201]

Affecting

A Member's measure must 'affect' trade in services to fall within the scope of the GATS. In the *EC – Bananas III* case the Appellate Body has provided the concept with a broad meaning.[202] A measure does not have to regulate the provision of the service in question, it is enough that a measure has influence on 'the conditions of competitions in supply of a service', be it that the measure must affect service suppliers in their capacity as service suppliers.[203] In order to determine when the conditions of competition in the supply of a service are influenced it must be clear which services or service suppliers are like services or like service providers. Naturally, competition is only distorted when services or service providers are competing and thus when likeness is established. This criterion is therefore essential in establishing whether the forms on non-discrimination (national treatment and MFN) that have been incorporated in the GATS are infringed. The GATS however, does not provide information on the question of likeness. Moreover, there is no jurisprudence regarding the matter.[204]

200 Krajewski 2003, p 70-71.

201 *Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II)* WT/DS8/R, WT/DS10/R, WT/DS11/R, 11 July 1996, par 6.22 and 6.28; Krajewski 2003, p 71.

202 *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)* WT/DS27/AB/R, 25 September 1997, par 220. Article XXVIII(c) GATS contains the following, non-exhaustive examples of measures affecting trade in services: the purchase, payment or use of a service; the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

203 Krajewski 2003, p 67-68; P Van den Bossche and E Denters 'Internationaal Economisch Recht' in N Horbach, R Lefeber and O Ribbelink (eds) Handboek Internationaal Recht (T.M.C. Asser Press, The Hague 2007), p 635.

204 Guidance regarding the term likeness can be found in GATT jurisprudence. Factors determining whether products can be considered as like products are *inter alia*: the physical characteristics of products, the habits and preferences of consumers regarding the products, the purpose for which the products are used and the international tariff-classification of the products. For the last factor the classification list in services could be used, Van den Bossche and Denters 2007, p 635.

2.3.6 Schedules of specific commitments

A WTO Member's schedule of specific commitments indicates if, and to what extent, that Member has undertaken commitments regarding market access, national treatment and additional commitments.[205] It contains the contractual promise that WTO Members provide regarding the opening of their services markets.[206] This approach leads Lowenfeld to conclude that the factual application of GATS is not that different from a rejected proposal during the Uruguay Round to provide the services agreement with an optional character.[207] In theory, Members are therefore free to determine the scope of the GATS in relation to its central obligations.[208]

2.3.6.1 Legal nature of the schedules

During the Uruguay Round the Group of Negotiating on Services created a document suggesting a common approach in scheduling in order to facilitate that Members' schedules of commitments remain comparable and unambiguous, the Scheduling Guidelines 1993.[209] This document has been revised resulting in the Scheduling Guidelines 2001.[210] As the 2001 Guidelines apply from the moment of their adoption all schedules drafted prior to 23 March 2001 have been drafted according to the 1993 Guidelines.[211] The 2001 Guidelines are mostly a reproduction of the 1993 guidelines with a few added provisions and contain no substantive

205 Article XX:1 GATS, see for an explanation of the provisions on market access, national treatment and additional commitments this chapter, par 2.5.1.

206 PC Mavroidis 'Highway XVI Re-Visited: The Road from Non-Discrimination to Market Access in GATS' (2007) 6 *World Trade Review*, p 3.

207 Lowenfeld 2008, p 122, fn 12.

208 It is doubtful whether all WTO Members indeed enjoy freedom regarding the commitments they adopt during negotiations as Members are far removed from having equal negotiating power. Moreover, the consequences of GATS obligations and adopted commitments can be difficult to fully comprehend. This holds especially true for developing countries with limited (human) resources devoted to the WTO. Similar: Trebilcock, Howse and Eliason 2013, p 615-616. Some developing countries argue that the negotiations relating to GATS provisions should be concluded before negotiations regarding concessions continue, ME Footer 'The General Agreement on Trade in Services: Taking Stock and Moving Forward' (2002) 29 *Legal Issues of Economic Integration*, p 15. The issue of negotiations relating to GATS provisions is discussed in this chapter, par 2.5.4.2.

209 GATT Group of Negotiating on Services, Scheduling of Initial Commitments in Trade in Services: Explanatory Note, 3 September 1993, MTN.GNS/W/164, par 1. See also: GATT Group of Negotiating on Services, Scheduling of Initial Commitments in Trade in Services: Explanatory Note, Addendum, 30 November 1993, MTN.GNS/W/164/Add.1 providing answers to several questions submitted by delegations relating to scheduling commitments.

210 WTO Council for Trade in Services, Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS), 23 March 2001, S/L/92.

211 See WTO (CTS) 2001a (Scheduling Guidelines 2001), footnote 1. For this reason, the Panel and the Appellate Body in the *US – Gambling* case refer to GATT (GNS) 1993a (Scheduling Guidelines 1993). As the Appellate Body explains, the 2001 Guidelines are to the current negotiations what the 1993 Guidelines were to the Uruguay Round negotiations, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)* WT/DS285/AB/R, 20 April 2005, par 190 fn 236.

change or deviation from the 1993 Guidelines.[212] To simplify matters, a reference to the Scheduling Guidelines is to the 1993 version only, unless specifically indicated otherwise.[213] The Guidelines provide information regarding the manner in which Members schedule their commitments, a matter on which the GATS itself is relatively brief.[214] The Scheduling Guidelines are non-binding.[215] However, disagreement exists as to the exact status of the Guidelines as a means of interpreting the GATS and the schedules of specific commitments. The Appellate Body has applied the codification of customary rules of international treaty interpretations in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT) as the standard of interpretation to be applied to WTO law, a practice most commentators agree with.[216]

The relevance of the discussion concerning the status of the Guidelines lies in their interpretative value. The list contained in Article 31 VCLT, together with the text, annexes and preamble, the context and the object and purpose of the treaty lead to a certain interpretation, which then can be confirmed by Article 32 VCLT. The instruments of Article 32 VCLT can only determine the outcome of the interpretation, if the outcome of Article 31 VCLT is uncertain or manifestly unreasonable. Prior to the circulation of the Panel and Appellate Body reports in the *US – Gambling* case, Krajewski refers to the Scheduling Guidelines 2001 as subsequent practice of WTO Members according to Article 31(3) sub b of the VCLT.[217] Mavroidis concludes that the Panel in *Mexico – Telecom* considered the Scheduling Guidelines as an integral part of the *travaux préparatoires*.[218] However, I do not agree with this reading for two reasons. First, the Panel relies on two documents attached to the Scheduling Guidelines 2001, a Note by the Chairman attached to

212 As indicated by the Appellate Body there are minor additions, US – Gambling Appellate Body Report, par 190 fn 236. For example, paragraph 8 of the 2001 Guidelines corresponds to paragraph 4 of the 1993 Guidelines yet adds a clarifying sentence. However, the substance of the paragraph is unaltered by this addition. See also Mavroidis 2007, p 5. Note that some annexes and an illustrative list of limitations to National Treatment have been added.

213 As existing commitments are based on the 1993 Guidelines. It is submitted that, as no substantive changes were made, citing either the 1993 or 2001 version should not make a difference.

214 A brief amount of information can be found in Articles XVI, XVII, XVIII and XX GATS.

215 As the name suggests, they are intended as guidelines, Krajewski 2003, p 76; the Guidelines do not provide an authoritative interpretation of the GATS, WTO (CTS) 2001a (Scheduling Guidelines 2001), par 1.

216 *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)* WT/DS2/AB/R, 20 May 1996. Krajewski refers to J Pauwelyn 'The Role of Public International Law in the WTO: How Far can we Go? (2001) 95 *American Journal of International Law*, at 542 and G Marceau 'A Call for Coherence in International Law – Praises for the Prohibition Against Clinical Isolation in WTO Dispute Settlement' (1999) 33 *Journal of World Trade*, p 115-128, Krajewski 2003, p 49.

217 Krajewski 2003, p 77. Delimatsis raises the argument that the adoption of the 2001 Scheduling Guidelines by the Council for Trade in Services could be seen as a shared agreement by the Members on this interpretation, P Delimatsis 'Don't Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the *US – Gambling Case*' (2006) 40 *Journal of World Trade*, p 1063 fn 22.

218 Mavroidis 2007, p 7, referring to *Mexico – Measures Affecting Telecommunications Services* (*Mexico – Telecoms*) WT/DS204/R, 1 June 2004, par 7.66 and 7.67.

the Notes for Scheduling Basic Telecommunications Services Commitments[219] and the Draft Model Schedule of Commitments on Basic Telecommunications.[220] However, it is not the legal status of the Scheduling Guidelines 2001 that is addressed by the Panel, it is the two attached documents that are *considered* to be an integral part of the *travaux préparatoires*. The Scheduling Guidelines are only addressed by the Panel as a rejection of possible added value to the interpretative value of the two documents: 'We accept that the footnote means that the attachment of the Draft Model Schedule and the Note by the Chairman to the Scheduling Guidelines should not in itself affect the existing interpretative status of the two documents.'[221] Second, the Panel does not provide a definitive answer to the question whether these documents should be considered under Article 32 of the VCLT. It only states that even if the documents should not be assessed under Article 31, then they still could be treated as an important part of the 'circumstances of its conclusion' within the meaning of Article 32 VCLT.

The Panel in *US – Gambling* believed the scheduling guidelines were to be seen as relevant context, thus falling under Article 31(2) sub a VCLT.[222] The Appellate Body rejects all the opinions which consider the Scheduling Guidelines as an instrument of treaty interpretation under Article 31 VCLT. The Guidelines 1993 should be seen as an agreement between the parties in the sense of Article 31(2) sub a VCLT.[223] Furthermore, the Appellate Body concludes that the Scheduling Guidelines 2001 cannot be considered as subsequent practice (of the 1993 Guidelines) as described in Article 31(3) sub b VCLT. As they were adopted in the context of future commitments, they cannot constitute evidence regarding existing commitments.[224] Instead, the Guidelines should be seen as supplementary means of interpretation within the meaning of Article 32 VCLT.[225] The underlying issue in the assessment of the Scheduling Guidelines in *US – Gambling* was whether the United States commitment could be interpreted by making use of the Services Sectoral Classification List as is suggested in the Guidelines.[226]

219 Negotiating Group on Basic Telecommunications, Note by the Chairman, Notes for Scheduling Basic Telecommunications Services Commitments, 16 January 1997, S/GBT/W/2/Rev.1.

220 Draft Model Schedule of Commitments on Basic Telecommunications, Informal Note by the Secretariat, 12 April 1995, JOB 1311.

221 *Mexico – Telecom* Panel Report, par 7.67.

222 *US – Gambling* Panel Report, par 6.86 and 6.94, rejecting an interpretation that would consider the Guidelines as preparatory work in the sense of Article 32 VCLT, par 6.95.

223 *US – Gambling* Appellate Body Report, par 174-178.

224 *US – Gambling* Appellate Body Report, par 190-195. Moreover, the Council for Trade in Services Decision adopting the 2001 Guidelines specifically state that they are non-binding and shall not modify any rights or obligations of the Members under the GATS: WTO Council for Trade in Services, Decision on the Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS), 23 March 2001, S/L/91, par 1-3. See also Mavroidis 2007, p 5.

225 *US – Gambling* Appellate Body Report, par 196-197.

226 GATT (GNS) 1993a (Scheduling Guidelines 1993), par 16, GATT (GNS) 1991a (Services Sectoral Classification List).

According to Ortino, it is unclear why the Appellate Body did not consider the Guidelines to 'constitute *evidence* of an underlying, albeit more limited in scope, consensus among parties that had emerged during the negotiations'. As recognized in the *Gambling* case by the Appellate Body, '[t]here was confirmation of the agreement to base the classification of services sectors and subsectors as much as possible on the Central Product Classification (CPC) list'.[227] The relevance here of the argument raised by Ortino is that the rejection of the Scheduling Guidelines as relevant context is based on a rejection of the document as agreement in its entirety. While that may be correct, nothing prevents the use of parts of the document as evidence of agreement when interpreting GATS provisions and schedules of commitments.[228] Moreover, the interpretation method prescribed in Article 31 VCLT should not be seen as a 'number of tests that must be ticked or crossed robotically in a particular sequence.'[229] Instead, 'all relevant elements should at least be taken into account as part of *one* overall analysis.'[230]

Concluding, the following remarks can be made regarding the interpretation status of the Scheduling Guidelines. In order to interpret schedules of commitments prior to the adoption of the Scheduling Guidelines 2001 (23 March 2001) recourse should be had to the 1993 Guidelines. Schedules of commitments after that date have been adopted according the 2001 Guidelines. Fortunately, the Guidelines mostly contain similar language. As concluded by the Appellate Body, when interpreting the GATS and schedules of commitments the Scheduling Guidelines should be seen as a supplementary means of interpretation within the meaning of Article 32 VCLT.[231] A case can be made that parts of the Guidelines may form an agreement among Members and thus context in the sense of Article 31 VCLT. While this may leave the Guidelines as less important than a classification of subsequent practice, their value is still considerable. Besides their legal significance, in particular due to their influence on the schedules of commitments,

227 F Ortino 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling*: a Critique' (2006) 9 Journal of International Economic Law, p 128. The Services Sectoral Classification List is based on the United Nations' Provisional Central Product Classification which creates a detailed categorization of both goods and services, UN Central Product Classification (CPC), 31 December 2008, UN ST/ESA/STAT/ SER/M77/Ver.2. The Services Sectoral Classification List simply copies the services categorization of that list, see Ortino 2006, p 125.

228 Ortino warns that the Appellate Body approach to the interpretation method in Article 31 VCLT and the resulting use of Article 32 VCLT ignores that the latter provision should only be relied upon if the examination resulting from Article 31 leads to ambiguous or obscure results. Article 32 should not be employed as a last resort exactly because its use would be applied to a 'difficult' Treaty text (since the application of Article 31 VCLT did not provide a satisfying result) and forms a discretionary step, which is signified by the phrase 'Recourse may be had to supplementary means of interpretation' in Article 32 VCLT. See for a full explanation of this critique on the Appellate Body's approach, Ortino 2006, p 125-132.

229 Ortino 2006, p 131, referring to M Lennard 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 *Journal of International Economic Law*, p 23.

230 Ortino 2006, p 131.

231 Ortino 2006, p 129 footnote 39.

the Guidelines are followed by most WTO Members when scheduling their commitments, leaving them significant in understanding the schedules.[232]

2.3.6.2 Overview of the schedules of commitments

As the four modes of supply relate to different types of activities, separate entries are inscribed for each mode of international service provision in service sectors where commitments are undertaken.[233] Entries in a Member's schedule of commitments indicate which restrictions to trade in services a Member will no longer impose. The following forms of entries are used: 'none', indicating that a Member will no longer uphold any restrictions and 'unbound', indicating that a Member wishes to remain free to maintain and adopt all restrictions.[234] A partial commitment will indicate a level of restriction somewhere between bound and none, either specifying measures which no longer can be maintained (a commitment close to unbound, while applying to those measures listed) or specifically listing which measures can be maintained (an almost full commitment, not applying to those measures listed).[235] As indicated above, most Members use the Services Sectoral Classification List in order to categorize services sectors in their schedules of commitments. The list classifies services into twelve main categories and close to 160 sectors and subsectors. Horizontal commitments are used in schedules next to sectoral (vertical) commitments. A horizontal commitment creates an inscription of the commitment for the mode of supply in question for all service sectors. This method is used to create a general commitment. Vertical commitments are then used to specify details for a specific service sector which are applicable in addition to the general horizontal commitment, or in order to limit the scope of the horizontal commitment in a specific service sector. As an example, the EU has inscribed a horizontal Mode 4 commitment relating to the posting of employees of a service provider in a specific list of service sectors. One of these sectors is the accounting service sector. In the vertical section of the schedule of commitments, several EU Member States, including the United Kingdom and the Netherlands

232 See for a similar argument based on the schedules of commitments, A Mattoo 'National Treatment in the GATS, Corner Stone or Pandora's Box?' (1997) 31 *Journal of World Trade*, p 110 fn 6, 115 and 117. He states that if scheduling practice by Members was based on a certain view that this gives an interpretation according to that view 'a certain credence'. This argument applies to the Guidelines as well as many Members have scheduled according to its suggestions. The schedules of specific commitments form an integral part of the GATS, see Article XX:3 GATS. Therefore, schedules might be drafted unilateral but they are interpreted as agreement among all Members, see *US – Gambling*, Panel Report, par 6.44 and *US – Gambling*, AB Report, par 159, see also M Krajewski 'Playing by the Rules of the Game? Specific Commitments after *US – Gambling and Betting* and the Current GATS Negotiations' (2005) 32 *Legal Issues of Economic Integration*, p 422-423.

233 The schedules of specific commitments are available online: <www.wto.org> (last visited 1 October 2015).

234 Note that restriction relates to the provision under which the commitment is made, 'any restrictions' and 'all restrictions' naturally only relate to either market access or national treatment. Scheduling additional commitments work slightly different as Members only inscribe exactly what type of additional commitment they wish to undertake.

235 WTO (CTS) 2001a (Scheduling Guidelines 2001), par 41-46.

have specified that such posted employees require a university degree and professional qualifications and three years' experience in the accounting sector. A specific limitation is provided by Germany, which exempts the commitment in relation to activities reserved by German law for auditors.[236]

2.4 Movement of persons, GATS Mode 4

The need for proximity between the service provider and the service receiver in relation to various specific services requires movement, either by the service receiver or the service supplier. Even if the service can be provided without movement, including in the form of Electronic Service Delivery (ESD), offering or concluding a contract with a service receiver may require movement. In relation to many services, the service provider may be required to confer or discuss details with the receiver, even where ESD is an option. Additionally, a service may require the provider to send its personnel to perform the service contract, for instance in relation to a large construction project. Complicated service contracts are difficult to execute if the provider has to hire all of its labour in the host state. Having to work with new personnel, and the hiring process itself, clearly leads to serious competitive disadvantages in relation to domestic service providers. From this perspective, the inclusion of GATS Mode 4 facilitates service provision. This paragraph will examine the general rules applying to such movement. Together with the specific details included in a certain Member's schedules of commitments, the conditions under which service providers of other Members can provide their services can be determined. Consumption abroad (Mode 2) and commercial presence (Mode 3) can involve movement of natural persons in the form of consumers and respectively personnel of corporations across borders. These forms of movement are not dealt with in this research.[237]

Article I:2 GATS defines trade in services on the basis of modes of supply. Mode 4 is defined as: the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. The scope of this provision is set out in the Annex on Movement of Natural Persons Supplying Services Under the Agreement (Annex MNP). Disagreement existed between developed and developing countries concerning the scope of Mode 4. In specific discussion centred on whether the annex should cover all nat-

236 See the EU horizontal Mode 4 commitment, World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, horizontal commitment and the vertical commitment for accounting services (to be found in category 1 Business Services at A professional Services, CPC 86212), available online: <www.wto.org> (last visited 1 October 2015).

237 See for instance: E Guild and P Barth, 'The Movement of Natural Persons and the GATS: A UK Perspective and European Dilemmas' (1999) 4 *European Foreign Affairs Review*, p 398.

ural persons, or only skilled labour and higher hierarchical corporate positions. The final result entails the inclusion of all categories of natural persons, yet the degree of liberalization is set in each Member's schedule of commitments.[238] The Annex MNP was negotiated within the Working Group on Labour Mobility created during the Uruguay Round in 1989.[239] The Annex MNP reads as follows:

> 1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.
> 2. The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
> 3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.
> 4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.[240]

GATS Mode 4 commitments grant mobility rights to natural persons in order to provide services on the territory of other WTO Members. This specific form of movement is characterised by the following aspects. The GATS is not intended to provide access to labour markets, it only applies to situations which entail the provision of services. This implies that GATS movements are always temporary; after the service contract is fulfilled the persons involved in providing the service will return to their home state.[241] The Annex MNP clarifies that the GATS is not intended to cover situations of permanent residence or obtaining citizenship of another WTO Member. It also specifies which natural persons enjoy GATS Mode 4: service providers and employees of a service provider. This last category of natural persons

238 J Bast 'Annex on Movement of Natural Persons Supplying Services Under the Agreement' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 576

239 Bast 2008a, p 153.

240 (Original footnote) The sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

241 See GATS Annex MNP par 2.

relates to two different forms of movement, intra-corporate transferees (ICT)[242] and posted workers. GATS Mode 3 covers the establishment of a commercial presence on the territory of another WTO Member from which services can be provided on a permanent basis. As such, a natural service supplier can supply his services through an office located in another WTO Member State if this is possible on the basis of that Member's GATS Mode 3 commitments.[243] Commitments relating to Mode 4 need to be adopted as they form the contractual promises of states to open their markets for nationals of other WTO Members providing services. As is apparent from the many flanking policies involved with the freedom of movement of persons under European law, simply stating that borders are opened is not enough. As such, negotiations relating to the GATS have touched upon issues such as temporary entry visa for business, professionals and technical personnel.[244]

2.4.1 Temporal scope of the Annex

The term 'temporary' is not defined by the GATS, nor by the Annex MNP. Instead, it varies according to the commitments inscribed by Members.[245] From these commitments it becomes apparent that Members tend to grant access to their territory for service providers for periods between three months and three years, with exceptions to five years.[246] Within these limits provided in a specific Member's schedule of commitments, the duration of the contract or the duration of the intra-corporate transfer will then determine the length of stay. Many schedules do not define the limits of temporary stay, or only for some of the Mode 4 categories they include. This uncertainty is a problem that needs to be addressed.[247] Uncertainty of the temporal scope also relates to blanket references added to the GATS Mode 4 commitment. As an example, the EU horizontal Mode 4 commitment indicates that '[a]ll other requirement of [Union] and Member States' laws, regulations and requirements regarding entry, stay and work shall continue to apply'. Consequently, national and EU law influences the temporal scope of the GATS Mode 4 com-

242 The term intra-company transferee is used as well, including under UK law. No difference is intended with the use of either term.

243 The freedom of establishment and the freedom of service providers as ensured by the TFEU thus do not correspond completely to GATS Mode 3 or GATS Mode 4.

244 Trebilcock, Howse and Eliason 2013, p 781-782; J Nielson and D Tagliori *A Quick Guide to the GATS and Mode 4* Background Paper OECD, WORLD BANK and IOM Seminar on Trade and Migration 12-14 November 2003, par 41, available online: <www.iom.int> (last visited 1 October 2015).

245 WTO (CTS) 1998b (Presence Natural Persons), par 3.

246 As an example, Japan uses 90 days for foreign business travellers but 5 years for certain intra-corporate transferees, see S Chaudhuri, A Mattoo and R Self 'Moving People to Deliver Services: How can the WTO Help?' (2004) 38 *Journal of World Trade*, p 370; PL Martin, 'GATS Migration and Labor Standards', International Institute for Labour Studies (2006) 165 ILO Discussion Paper, available online: <www.ilo.org>, p v; C Dommen 'Migrants' Human Rights: Could GATS Help?' (2005) Migration Information Source, first paragraph, available online: <http://www.migrationinformation.org> (last visited 1 October 2015).

247 WTO Council for Trade in Services, Presence of Natural Persons (Mode 4), Background Note by the Secretariat, 15 September 2009, S/C/W/301, par 97; WTO (CTS) 1998b (Presence Natural Persons), par 45.

mitment, without any specification. It is unclear if the blanket reference applies the conditions as they stood at the moment of inscribing the commitment (i.e. a standstill clause), or as they apply at any given moment.[248]

2.4.2 Personal scope of the Annex

Two types of natural persons are covered by Mode 4 of the GATS, natural persons supplying services, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service. The GATS indicates that service provision under Mode 4 concerns the movement of service suppliers of other Members.[249] The GATS does not apply to a WTO Member's domestic service supplier, or a non-Member service supplier. Therefore, a service supplier cannot rely on the GATS to enable entry of nationals of other WTO Members in order to provide services in its own state.[250] The GATS provides a definition of the term 'natural person of another Member' in Article XVIII. Nationality determines the home state of the natural person involved. Thus, a Dutch national residing in the United States is, from a GATS perspective, considered a Dutch natural person allowing this person to rely on GATS Mode 4 *vis-à-vis* all WTO Members, except the Netherlands (as that is the home state). Moreover, non-nationals who have obtained the right of permanent residence in a WTO Member State are considered natural persons of that (host) WTO Member State if that state essentially provides the same treatment to permanent residents as it does to its own nationals. Permanent residents of a WTO Member State are also considered natural persons of that state as defined in the GATS if that state does not have nationals.[251] As an example, EU law determines that third-country nationals acquire the status of long-term residents when they are legally residing in an EU Member State for five consecutive years.[252] Such persons are thus considered natural persons of their EU Member State of residence.

A juridical person within the meaning of the GATS:

> (...) means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association.[253]

248 This issue will be addressed in chapter 7, par 7.5.3.
249 GATS Article II, XVI and XVII.
250 WTO (CTS) 2009 (Presence Natural Persons), par 8 and 19.
251 Article XXVIII(k) GATS.
252 Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ (2004) L16/44, Article 4.
253 Article XXVIII(l) GATS.

For a juridical person to be classified as a 'juridical person of another Member', and thus for it to be able to rely on GATS Mode 4, it needs to be constituted or otherwise organized under the law of that other Member and be engaged in substantive business operations in the territory of a WTO Member (not necessarily the same). In other words, a juridical person's 'nationality' is determined by the law according to which it is organized.[254] Mode 3 allows for the setting up of a commercial presence. The GATS clarifies that setting up a commercial presence does not affect the requirement 'juridical person of another Member'. The GATS indicates that:

> 'juridical person of another Member' means a juridical person which is (...) in the case of the supply of a service through commercial presence, owned or controlled by:
> 1. natural persons of that Member; or
> 2. juridical persons of that other Member identified under subparagraph [XXVIII(m)(i)].[255]

2.4.2.1 Self-employed service providers

Natural persons remunerated directly for their service provision by a customer in a host Member State are covered by GATS Mode 4 and the Annex MNP as natural persons who are service suppliers of a Member. In the EU schedules of commitments this category is referred to as 'independent professionals'. The natural person needs to be self-employed and be a national or permanent resident of another Member State.[256] The term 'professionals' might cause confusion as the activities of self-employed Mode 4 service providers relate to all service sectors, not just to the 'professional services' category specified in the services classification list.[257] As indicated, Mode 4 relates to all categories of service providers, including those without specific skills.

2.4.2.2 Employees of service suppliers

This category allows employers, who may be juridical persons or natural persons themselves, to use their employees to provide services on the territory of another WTO Member State. The nationality of both the employee and the employer (or place of establishment in case of a juridical person)[258] needs to be that of a Mem-

254 Article XXVIII(m)(i), see also Article XXVIII(n)
255 Article XXVIII(m)ii GATS, the definition of owned or controlled can be found in Article XXVIII(n).
256 WTO (CTS) 2009 (Presence Natural Persons), par 11, 13 and 14.
257 WTO (CTS) 2009 (Presence Natural Persons), par 26.
258 Article XXVIII GATS.

ber State, but not necessarily of the same Member State.[259] Clearly, GATS Mode 4 does not apply to a domestic company employing foreign natural persons. Domestic service providers will not be able to rely on GATS commitments against measures affecting foreign natural persons they wish to employ.[260] A specific problem is that it may not be easy to determine whether a natural person is self-employed, or employed by a service supplier. This becomes problematic when domestic service suppliers provide services factually through foreign employees on the home state territory while indicating that the foreign employee is a self-employed service provider. The problem arises the other way around as well when a certain Member State may claim that a self-employed foreign national is not self-employed but employed by a nationally-owned company. The dividing line between self-employment and employment becomes thin when a service supplier provides its services to a host-country company on a contractual basis, which would be covered by Mode 4, while the same person would not be covered on an employment basis.[261]

As noted by Dawson:

> Shortages of labour have traditionally been dealt with through permanent migration or temporary guest worker programmes. Globalization has resulted in expanding and everchanging production and distribution networks. This dynamism has tipped the scales in favour of temporary movement of service providers to fill short-term labour market shortages, and has increased demand for streamlined rules and procedures for cross-border employment.[262]

When this change in the manner in which labour is supplied is taken into account, it is unsurprising that this issue has led to significant debate based on EU law. A similar debate is conceivable on the basis of GATS Mode 4 commitments. As is apparent from the *US Gambling* case, Members may not fully realize the scope of the commitments that they have inscribed in their schedules.[263] In its background note on presence of natural persons, the Council for Trade in Services secretariat indicates that this distinction is often drawn under national law. The secretariat

259 WTO (CTS) 2009 (Presence Natural Persons), par 15.

260 As with EU law, which does not apply to 'wholly internal situations' the GATS applies to international trade in services and cannot be used to 'circumvent' national law, that is, using GATS commitments to provide services in the home state through foreign employees; WTO (CTS) 2009 (Presence Natural Persons), par 19; chapter 3, par 3.3.1.4.

261 See in relation to EU law: chapter 3, par 3.3.2; see also WTO (CTS) 2009 (Presence Natural Persons), par 20 and 21. The EU anticipates to such problems by specifically excluding service sector CPC 872 (placement and supply services of personnel) in the revised offer from both the contractual service supplier category and the independent professional category, WTO (CTS) 2005 (EU Revised Offer), horizontal commitment Mode 4.

262 LR Dawson 'Labour Mobility and the WTO: The Limits of GATS Mode 4' (2013) 51:1 *International Migration*, p 5.

263 See for an extensive explanation of the *Gambling* case: this chapter, par 2.5.1.1.

provides the example of the labour legislation of Hong Kong, China, which uses similar criteria as those used to distinguish employment and self-employment under EU law:

> Determining control:
> - Who decides on the recruitment and dismissal of employees?
> - Who pays for the employees' wages and in what ways?
>
> - Who determines the production process, timing and method of production?
> - Who is responsible for the provision of work?
>
> Determining ownership of factors of production:
> - Who provides the tools and equipment?
> - Who provides the working place and materials?
>
> Economic considerations:
> - Does [the natural person] carry on business on his own account or carrying out the business for the employer?
> - [Is the natural person involved] in any prospect of profit or is he liable to any risk of loss?
> - How are [the natural person's] earnings calculated and profits derived?[264]

The detail provided demonstrates the difficulties in drawing a line between self-employment and employment. This line must nevertheless be drawn in relation to GATS Mode 4, otherwise companies can hire personnel in another WTO Member under the guise of receiving services from a service provider of that Member State.

2.4.2.3 Categories of natural persons used in practice

The GATS provisions and the Annex MNP provide the general division between the self-employed and the employees of service providers. In practice the schedules of commitments refer to self-employed Mode 4 service suppliers as 'independent professionals'. Employees of service providers relying on Mode 4 are often distinguished into three categories, 'contractual service suppliers', 'intra-corporate transferees' and 'business visitors' (BV). These categories relate to the nature of the activity performed by the employee.

Contractual service suppliers are employees of a service provider who actually performs the service contract concluded between the provider (the employer) and

264 WTO (CTS) 2009 (Presence Natural Persons), par 21, referring to the Labour Department, Hong Kong, China, available online: <http://www.labour.gov.hk/eng/faq/cap57b_whole.htm> (last visited 1 October 2015).

the receiver located in another WTO Member State. The service provider thus has no commercial presence on the basis of Mode 3. This category relates to the EU law concept of 'posted workers'.[265] Intra-corporate transferees differ from contractual service suppliers as the service provider does have a commercial presence on the territory of the Member State where the receiver is located. Business visitors actually do not perform services, instead they prepare future service provision. The employees of a WTO Member State may be sent to another Member State to prepare the setting up of a commercial presence or they may negotiate a service contract with a potential service receiver. This category facilitates service provision (or establishing a commercial presence) and forms a vital addition. Even when services trade can be conducted via Mode 1 (for instance over the internet), it will often be necessary for the service provider to send its personnel to the (potential) receiver, to agree on the terms, or to take a look at the business of the service receiver in order to optimize the provided service. Even after the contract is concluded, business visitors may be needed to advise the receiver, or to perform maintenance (for example after installing computer software).

Note that these categories are customary among most Members, but there is no obligation to inscribe commitments on the basis of these categories. These categories are based on the nature and the presence of the service supplier. However, other categorizations can be found as well.[266] The EU has also included hierarchical categorizations, inscribing a commitment relating to intra-corporate transferees in a senior position or possessing specialist skills. This commitment excludes functions at a lower level in corporate hierarchy.[267] As such, within the confinements of the GATS provisions and the Annex MNP, WTO Members are free to create different categorizations. Finally, new categories may be created during the negotiations. The EU has offered to add two categories to its Mode 4 commitments in its revised offer made during the Doha Round negotiations.[268] The EU revised offer includes 'independent professionals' which addresses self-employed service providers, and a new category of intra-corporate transferees, 'graduate trainees'.[269]

265 Chapter 3, par 3.4.2.

266 WTO (CTS) 2009 (Presence Natural Persons), par 26.

267 See: WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal commitment Mode 4, i(a) and (b) (Intra-Corporate Transferee).

268 The Doha Round Negotiations will be discussed in this chapter, par 2.5.4. The content of the EU revised offer will be discussed in the national chapters, chapter 5, par 5.3.5 and chapter 6 par 6.3.5.

269 WTO (CTS) 2005 (EU Revised Offer), horizontal commitment Mode 4. Note that the general remarks in the EU's offer indicate that the offer relating to graduate trainees is conditional on a critical mass of commitments by other Members in this category.

2.4.3 Reluctance in adoption of Mode 4 commitments

This paragraph will provide a general overview of the level of Mode 4 commitments that were inscribed by WTO Members.[270] Most of the commitments inscribed in the schedules of commitments resulting from the Uruguay Round negotiations relate to the other modes of service supply. Mode 4 is by far the least liberalized mode of service provision. At the same time, commitments that do relate to Mode 4 favour the highly educated or skilled or managers and directors which fits a pattern that can be observed in other forms of migration as well. While globalization creates opportunities to move for economic gain, these opportunities apply mostly to those who are already in a fortunate economic position. The movement of those who are perceived as threats to welfare systems are excluded.[271] Mode 4 service provision is also hampered by the most restrictions in the commitments that have been adopted.[272] Of the Mode 4 commitments that were inscribed half concern intra-corporate transferees and are therefore connected to foreign investment (Mode 3).[273] Only 17 percent of Mode 4 commitments relate to lower educated personnel and only ten Members have adopted some form of liberalization regarding jobs that require a lower level of education.[274]

The outcome of the debate concerning the inclusion of service trade within the WTO framework was that the GATS applies to both the capital and labour factor of production. Moreover, the negotiations on the Annex MNP were concluded with the inclusion of all natural persons, without any inherent limitation relating to seniority or skill.[275] The actual level of liberalization is set by the commitments undertaken by Members. The current low level of Mode 4 commitments, their bias towards the highly skilled and their connection with commercial presence, does not reflect the capital / labour balance struck during the Uruguay Round negotiations

270 The specific Mode 4 commitments inscribed by the Netherlands and the UK are described in chapter 5, par 5.3 and chapter 6, par 6.3.

271 Trebilcock, Howse and Eliason 2013, p 787-788; E Guild 'The Legal Framework, Who is Entitled to Move?' in D Bigo and E Guild (eds) *Controlling Frontiers, Free Movement into and within Europe* (Ashgate, Farnham 2005), p 14; J Nielson and O Cattaneo 'Current Regimes for the Temporary Movement of Service Providers: Case Studies of Australia and the United States' in A Mattoo and A Carzaniga (eds) *Moving People to Deliver Services* (World Bank, Washington DC 2003), p 117; A Geddes 2005, Immigration and the welfare state, in: E Guild and J Selm (eds) International Migration and Security, Opportunities and Challenges (Routledge London 2005), p 159-160. See also: T Hayter *Open Borders: The Case Against Immigration Control* (Pluto Press, London 2000), p 64-54.

272 Trebilcock, Howse and Eliason 2013, p 781; UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (Earthscan, New York 2005), p 89; Dommen 2005, first paragraph.

273 The EU defines intra-corporate transferees as: 'a natural person working within a juridical person, other than a non-profit making organization, established in the territory of an WTO Member, and being temporarily transferred in the context of the provision of a service through commercial presence in the territory of [an EU] Member State'. WTO (CTS) 2006 (EU Consolidated GATS Schedule) horizontal commitment Mode 4 fn 7.

274 UN Millennium Project 2005, p 89. It should be noted that concessions in the schedule of commitments only indicate limitations that a WTO-Member may no longer uphold. Unilateral liberalization is not only possible but also the factual situation as countries have more liberal policies than indicated in their schedule, see UN Millennium Project 2005, p 87.

275 Bast 2008b, p 575-576.

between developed and developing countries.[276] This is explicitly clear from the text of the Decision on Movement of Natural Persons, which determined that negotiations on movement of persons were to continue after the Uruguay Round to increase Mode 4 liberalization:

> Mindful of the objectives of the General Agreement on Trade in Services, including the increasing participation of developing countries in trade in services and the expansion of their service exports; Recognizing the importance of achieving higher levels of commitments on the movement of natural persons, in order to provide for a balance of benefits under the General Agreement on Trade in Services;[277]
>
> Negotiations on further liberalization of movement of natural persons for the purpose of supplying services shall continue beyond the conclusion of the Uruguay Round, with a view to allowing the achievement of higher levels of commitments by participants under the General Agreement on Trade in Services.[278]

This begs the question why developed states are reluctant to accept Mode 4 liberalization. The most obvious answer to this question is the connection of service mobility with immigration law and labour market policies, an issue which will be discussed in the national chapters. When discussing the lack of real progress in the area of Mode 4 liberalization, it should be taken into account just how revolutionary the inclusion of service mobility within the WTO legal order was, exactly due to the sensitivity of the policy fields influenced by it. Nevertheless, it should be emphasized that Mode 4 migration is only one specific *temporary* form of migration. Winters *et al* argue that temporary migrants are hardly a threat to culture or integration and rarely make use of public services. Moreover, they state that the perceived threat that low-skilled workers may constitute is similar to the challenge posed by imports of labour-intensive goods. That challenge has already been significantly overcome by economic gains that trade delivers and adjustment policies for local unskilled workers.[279] They also emphasize that 'the jobs are permanent, the workers not'.[280] According to Martin this line of argumentation places too much emphasis on the difference between cross-border service provision and migration. He states that proponents of Mode 4 liberalization ignore that there is a

276 See also Bast 2008b, p 576-577.

277 GATT, Decision on Movement of Natural Persons, MTN/FA III-7(h), available online: <www.wto.org> (last visited 1 October 2015); Trebilcock, Howse and Eliason 2013, p 481.

278 GATT 1994 (Decision MNP), par 1.

279 LA Winters, TL Walmsley, ZK Wang & R Grynberg 'Negotiating the Liberalization of the Temporary Movement of Natural Persons' (2003) 26:8 *The World Economy*, p 1142.

280 Winters *et al* 2003, p 1143. Geddes indicates that the post-war labour migration was supposed to be temporary as well but turned into families settling and forming ethnic minorities, Geddes 2005, p 165.

difference between goods and services, based on the simple fact that Mode 4 service provision concerns humans.[281] The Mode 4 debate should be held without losing sight of the reality of immigration rules and the regulation of labour markets.[282] In addition to the limited commitments, a trend can be observed where Mode 4 obligations that have been undertaken, are undermined as a result of what Dawson refers to as 'administrative obfuscation':

> The recent history of labour mobility negotiations suggests that while opening labour markets to lower-skilled workers has resonance with dominant pro-development norms, wealthy countries are more likely to sidestep additional labour mobility commitments through administrative obfuscation rather than rejecting those commitments outright and being perceived as anti-development.[283]

This image will be confirmed when discussing the implementation of GATS obligations by the Netherlands and the UK.[284]

2.5 Obligations of WTO Members in respect of Mode 4 service suppliers

This paragraph will describe the main obligations included in the GATS. The GATS combines a system of general obligations with specific obligations which only apply to the commitments undertaken by WTO Members. The main mechanism towards trade liberalization is a combination of these obligations and the request directed at the Member States to negotiate service trade liberalization commitments in successive negotiation rounds. This should lead to the progressive dismantling of barriers to services trade between WTO Members.[285] An overview of obligations is incomplete without the relevant exceptions that apply or may be invoked by a Member as a means to derogate from the GATS obligations and the commitments it has undertaken. The final part of this paragraph will address the service trade negotiations as they are taking place within the Doha Round. On a parallel track WTO Members are negotiating in areas where the legislative framework of the GATS was left incomplete by the Uruguay Round.

281 Migrants could become interested in their new surroundings and may want to change their temporary status. Moreover, people produce offspring, Martin 2006, p 20-21.
282 Martin 2006, p 20-22.
283 Dawson 2013, p 5.
284 Chapter 5, par 5.5, chapter 6, par 6.5.
285 Preamble to the GATS, see also Article XIX GATS.

2.5.1 The trade liberalization mechanism of GATS

Thee GATS obligations apply only in so far as WTO Members have specifically indicated in their schedules of commitments. Firstly, the market access provision seeks to provide access to services markets for service providers by targeting a certain type of measures which have as their objective the restriction of access. Secondly, once a foreign service, or a foreign service provider has access to a specific Member's service market, the national treatment obligation prohibits both direct and indirect discrimination in relation to domestic services, domestic service providers. Thirdly, once a Member has subjected a certain service sector and mode of supply to specific commitments, the domestic regulation provision automatically applies to such commitments as well. That obligation targets unnecessary non-discriminatory measures which hinder trade in services. The GATS also provides the possibility to inscribe additional commitments other than those relating to market access, national treatment and the domestic regulation obligation. These additional commitments have no central feature in this research and will therefore not be discussed.

2.5.1.1 Market access

Article XVI contains the market access principle.[286] This provision only applies if Members have undertaken a specific commitment. Paragraph 1 provides:

> With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.[287]

As indicated by the Appellate Body, this paragraph in itself contains no obligation, simply linking the market access obligation to the obligations a Member has undertaken as inscribed in its schedule.[288] Paragraph 2 describes the substance of an Article XVI commitment as it lists the type of measures a Member can no longer maintain if a full market access commitment has been inscribed. Members can also inscribe partial commitments. Under Article XVI a Member inscribes a partial

286 A useful short assessment of this provision is provided by: Ortino 2006, p 120-121. See also Mavroidis 2007, p 3.

287 (Original footnote) If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(a) of Article I and if the cross-border movement of capital is an essential part of the service itself, that Member is thereby committed to allow such movement of capital. If a Member undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2(c) of Article I, it is thereby committed to allow related transfers of capital into its territory.

288 *US – Gambling* Appellate Body Report par 235.

commitment by specifying one or more of the measures listed in paragraph 2 they wish to maintain.[289] The listed measures are:

(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;[290]
(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

These measures are considered particularly damaging for market access, and unjustified from an economic policy perspective.[291] The provided list is exhaustive, a reading confirmed by the Panel in the *US – Gambling* case. Therefore, Members can maintain other measures restricting market access even if a full market access commitment has been inscribed.[292] The Panel's finding was not reviewed by the Appellate Body on appeal. As noted by Krajewski, the Appellate Body stated that

289 In contrast with Article XVII and XVIII, where partial commitments can relate to any measure Members wish to exempt from their commitment, partial commitments under Article XVI only specify the paragraph 2 measures they wish to maintain as the exhaustive nature of the list renders scheduling other exceptions to the undergone commitment unnecessary.

290 (Original footnote) Subparagraph 2(c) does not cover measures of a Member which limit inputs for the supply of services.

291 Zleptnig 2008, p 392; The types of measures to which market access applies in the context of trade in goods, tariffs, quantitative restrictions and other border measures, are not readily available in the services context. As Lang states, the list of market access restrictions included in Article XVI:2 GATS is roughly analogous to these border measures traditionally applied in relation to trade in goods, Lang 2009, p 160.

292 For an explanation of earlier uncertainty regarding the exhaustive nature of the list, see Krajewski 2003, p 82-84, who concluded that the list is indeed exhaustive; implicit Mattoo 1997, p 109; C Arup *The New World Trade Organization Agreements, Globalizing Law through Services and Intellectual Property* (Cambridge University Press Cambridge 2000), p 121; see also GATT (GNS) 1993a (Scheduling Guidelines 1993), par 4.
Article XVIII provides the possibility of scheduling other measures besides those subject to scheduling in Article XVI and XVII, including measures relating to qualifications, standards, or licensing (the subject of Article VI). If Article XVI was not limited to the list provided in the second paragraph, the possibility of scheduling these other measures under a separate provision, Article XVIII would not be needed. This reading of Article XVI has been confirmed by the Panel in the *Gambling* case in a finding not reviewed by the Appellate Body, US – *Gambling* Panel Report, par 6.298 and par 6.318. See also Pauwelyn 2005, p 159; Krajewski 2005, p 431-432; Delimatsis 2006a, p 1064-1065 and Zleptnig 2008, p 393.

the US could not maintain any of the listed measures by inscribing a full market access commitment, which would seem to confirm the Panel's view.[293] Similarly, the elaborations contained within that list are exhaustive as well. The *US – Gambling* case confirmed that only measures in the form of numerical quotas, monopolies, exclusive service suppliers or the requirement of an economic needs test are addressed by Article XVI:2(a) and only measures in the form of designated numerical units in the form of quotas or the requirement of an economic needs test are addressed by Article XVI:2(c).[294] While this Panel ruling only applies to XVI:2(a) and (c), arguably the exhaustive nature of the elaborations should apply to sub (b) and (d) – (f) as well.[295] The Panel conclusion was not reviewed by the Appellate Body on appeal; it nevertheless seemed to implicitly agree when it stated that the words 'in the form of' should not be replaced by 'that have the effect of'.[296]

In relation to Mode 4, the primary measures which must be removed based on the market access obligation would be those that reserve the provision of services to nationals. Another example of such measures are regulations that restrict non-national service providers to sectors which serve the national interest. Such measures usually set a certain skill level or income level as a threshold, including through points-based systems. These measures then entail a zero quota for non-national service providers, either due to the specific service or due to the service provider falling below the threshold. Additionally, problematic measures are those that target the personnel of a service provider. Examples of such measures are

293 Krajewski 2005, p 431, referring to: *US – Gambling* Appellate Body Report, par 215; Zleptnig 2008, p 401. Ortino, on the other hand, indicates that the Appellate Body would possibly disagree with the finding that the list in Article XVI:2 is exhaustive. He considers the fact that the Appellate Body applies both Article XVI:2(a) and (c) to the US measures as indicating the opinion that they are not really exhaustive in nature, as that would not allow for the limitations listed in subparagraphs (a) to (f) to apply cumulatively. In my opinion this argument is incorrect as nothing prevents a measure from falling into two categories of exhaustively formulated limitations. A measure can simply restrict both service suppliers and service transactions, thus falling within both subparagraph (a) and (c). I do not see why that would make those subparagraphs no longer exhaustive. Ortino cites Pauwelyn as source for the argument, yet Pauwelyn does not seem to indicate the argument at the cited page, nor anywhere else in the specific publication, Ortino 2006, p 137 fn 67 citing Pauwelyn 2005, p 163. Ultimately, I do not think the Appellate Body would consider the XVI:2 list to be non-exhaustive as there is overwhelming evidence in support for the exhaustive nature of that list, see Zleptnig 2008, p 392.

294 *US – Gambling* Panel Report, par 6.325 regarding XVI:2 (a) and 6.341 regarding XVI:2 (c).

295 XVI:2 (a) contains the phrase 'whether in the form of'. The Panel specifically indicated that the omission of the word 'whether' in XVI:2 (c) is irrelevant. As the Panel's reasoning is based on the phrase 'in the form of', logically the exhaustive nature of the elaborations should also apply to XVI:2 (b) and (d), containing the same phrase. Moreover, I agree with Pauwelyn's implicit application of the Panel reading relating to XVI:2 sub (a) and (c) to all six definitions, as XVI:2 sub (e) and (f) are also formulated in an exhaustive manner, see Pauwelyn 2005, p 159. This conclusion is less relevant regarding XVI:(e) as it does not contain an elaboration of forms the included measures can take by simply stating that measures which restrict or require specific types of legal entity or joint venture shall not be maintained. Note that Article XVI:2(f) contains the phrase 'in terms of'. Nevertheless, I see no reason to apply different reasoning to this phrase, as it is equally formulated in an exhaustive manner as XVI:2 (a) to (d).

296 Krajewski 2005, p 432, referring to: *US – Gambling* Appellate Body Report, par 232. The actual application by the Dispute Settlement Bodies of Article XVI to the facts of the US - Gambling case has been heavily critiqued, which will be discussed below, see for example: Krajewski 2005, p 432 and Pauwelyn 2005, p 159-160.

work permit quota, economic needs tests or requirements related to the hiring of nationals or foreigners with preferred access to the labour market.[297]

2.5.1.2 National treatment

Article XVII GATS contains the national treatment provision. As with Article XVI, Article XVII only applies insofar Members undertake specific commitments. Article XVII provides:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[298]
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

The *China – Publications and Audiovisual Products* Panel report provides a useful interpretation of Article XVII.[299] A Member scheduling a full commitment under Article XVII would no longer be allowed to adopt any measure affecting the supply of the service in the sector to which the commitment applies, if that measure treats foreign services or service suppliers[300] less favourably than domestic like services and like service suppliers.[301] As indicated in paragraph 2, both *de jure* and *de facto* discrimination are covered by Article XVII.[302] In order for Article XVII to apply, a

297 Examples of these measures imposed by the Netherlands and the UK will be described in chapters 5 and 6.
298 (Original footnote) Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.
299 *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)* WT/DS363/R, 12 August 2009.
300 Regarding the criterion 'service supplier of another Member' the Panel in *China – Publications and Audiovisual Products* had to establish whether foreign invested enterprises are to be seen as service suppliers of another Member. The Panel concluded with regard to Mode 3 that this form of service provision requires the provision of a service through an entity 'owned' or 'controlled' by persons of another Member, *China – Publications and Audiovisual Products* Panel Report, par 7.973-7.974, repeated in several other paragraphs.
301 See also: *China – Publications and Audiovisual Products* Panel Report, par 7.956.
302 Mattoo 1997, p 110, Krajewski 2003, p 108, confirmed by the Appellate Body in EC – Bananas III Appellate Body Report, par 233.

measure needs to affect the supply of a service. In *EC – Bananas III*, the Appellate Body gave Article XVII, in analogy with its equivalent GATT provision (GATT Article III) a broad interpretation.[303] A measure does not have to regulate the provision of the service in question, it is enough that a measure has influence on the conditions of competition in the supply of a service, albeit that the measure must affect service suppliers in their capacity as service suppliers.[304]

Article XVII:3 defines less favourable treatment as modifying conditions of competition in favour of a Member's own services or service suppliers.[305] In order to determine whether the conditions of competition relating to the supply of the provision of a specific service are influenced, it must be clear which services or service suppliers are like services or like service suppliers. Competition is only distorted when services or service providers are competing and thus when likeness is established. The 'likeness' criterion is therefore essential in establishing whether the forms on non-discrimination that have been incorporated in the GATS are infringed. However, the GATS does not specify what determines likeness and as of yet there is no jurisprudence regarding the matter. Guidance regarding the term likeness can be found in GATT jurisprudence as Article III GATT contains the similar principle of 'like products'.[306] Ultimately, determining likeness requires an examination on a case by case basis.[307] The national treatment obligation ensures non-discrimination, which presupposes that market access is provided.

In relation to Mode 4, foreign service self-employed service providers or foreign service suppliers posting their employees, either as ICTs or as posted workers, should be able to operate on a competitive level playing field with domestic service

303 *EC – Bananas III* Appellate Body Report, par 220. Article XXVIII(c) GATS contains the following, non-exhaustive examples of measures affecting trade in services: the purchase, payment or use of a service; the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

304 Krajewski 2003, p 67-68; Van den Bossche and Denters 2007, p 635.

305 See for an extensive description of the concept of less favourable treatment, including a comparison with the same principle in the GATT: Ortino 2008, p 177-186.

306 GATT and WTO jurisprudence regarding Article III GATT has not led to a predictable and consistent approach determining when products are 'like', K Nicolaïdis and JP Trachtman 'From Policed Regulation to Managed Recognition in GATS' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000), p 254-255. Factors determining whether products can be considered as like products are *inter alia*: the physical characteristics of products, the habits and preferences of consumers regarding the products, the purpose for which the products are used and the international tariff-classification of the products. For the last factor the classification list in services could be used, Van den Bossche and Denters 2007, p 635. A complicating factor in the use of classification systems is that more than one system is in use, Fernandes 2008, p 137. The following classification systems are used regarding services: the UN Central Product Classification, UN Central Product Classification (CPC), 31 December 2008, UN ST/ESA/STAT/SER/M77/Ver.2, the Services Sectoral Classification List, GATT (GNS) 1991a (Services Sectoral Classification List), and the International Standard Industrial Classification of all economic activities, International Standard Industrial Classification of all economic activities (ISIC), 11 August 2008, UN St/ESA/STAT/SER.M/4/Rev.4. The use of different classification systems is problematic as the Services Sectoral Classification List is based on the CPC list but is not identical. The Services Sectoral Classification List combines several CPC classifications in one sub-sector. Moreover, the CPC list was created for statistical purposes and therefore not necessarily based on competitive relationships of services, Krajewski 2003, p 101.

307 Nicolaïdis and Trachtman 2000, p 255.

suppliers. As an example, under EU law, work permit obligations and administrative formalities are considered to disturb this level playing field and verifying the legality of the posting of a worker is only allowed if that verification fulfils the proportionality principle.[308] Essentially this entails a light obligation to provide information concerning the length of the posting and the workers involved. Applying this logic to the Mode 4 implementation legislation in the Netherlands and the UK would mean the illegality of sponsorship obligations and similar measures. Clearly, the need for a service receiver to obtain a sponsorship licence and to fulfil the related obligations leads foreign service providers to be less competitive than domestic suppliers.[309] Generally speaking, the regulatory framework imposed on national service providers, including licensing, qualifications and technical standards, must not lead to a less favourable application *vis-à-vis* foreign service providers.[310] A work permit requirement, if not imposed in the form of quota, but simply as requirement, may constitute a violation of the national treatment obligation.[311]

2.5.1.3 Domestic regulation

The intention of Article VI is to target regulations that are not dealt with by the provisions on market access and national treatment which present unnecessary impediments to international trade in services.[312] Article VI paragraphs 1, 3, 5 and 6 only apply to sectors where specific commitments have been undertaken.[313] The regulations intended to be captured by Article VI are those that address objectives, in a non-discriminatory manner which fall within the scope of regulatory autonomy of the Members, yet do so in a manner that is not required in achieving that objective.[314] Article VI consists of three parts: procedural rules, a mandate relating to the development of disciplines concerning licensing, qualifications and tech-

308 Chapter 3, par 3.4.2.
309 Chapter 5, par 5.2.2.3; chapter 6, par 6.2.2.4.
310 The next subparagraph, dealing with domestic regulation, targets qualifications, technical standards and licensing conditions applied in a non-discriminatory manner.
311 Note that measures can also be inconsistent with both the market access obligation and the national treatment obligations, see for example Trebilcock, Howse and Eliason 2013, p 487.
312 A thorough description of Article VI GATS is provided in Delimatsis 2006b.
313 No commitments regarding Article VI itself can be inscribed. Article VI paragraphs 1, 3, 5 and 6 only apply to sectors that have been scheduled. It is unclear whether this requires commitments under both XVI or XVII or whether a specific commitment in one domain is enough, though the text seems to indicate the latter and I will adopt this approach, see Wouters and Coppens 2008, p 217. Article XVIII is included in the specific commitments part of the GATS. Thus scheduling a measure under this provision should trigger the application of Article VI as well. In my opinion, it is safe to presume that Article VI applies only insofar as commitments have been scheduled under either provision.
314 Delimatsis 2006b, p 17; in the words of the Panel in *US – Gambling*, '(...) Members maintain the sovereign right to regulate within the parameters of Article VI of the GATS', US – Gambling Panel Report, par 6.316.

nical standards, and rules relating to the provisional application on the topic provided in the mandate.[315]

The first three paragraphs and paragraph 6 provide procedural rules referred to by Delimatsis as introducing the concept of procedural due process in the GATS.[316] Members are required to ensure that measures of general application are administered in a reasonable, objective and impartial manner. Regarding specific administrative decisions, Members are required to provide independent review. Moreover, where appropriate, remedies for decisions that affect trade in services must be provided. Finally, transparency and due process are required in procedures where a service supplier has made a request for authorization.[317] Paragraph 6 requires Members to provide adequate procedures to verify the competence of professionals of other Members. The only requirement is the availability of an adequate procedure, no substantial requirement is listed. Exactly what an adequate procedure entails is unclear.[318]

Article VI:4 provides a mandate to the Council for Trade in Services relating to the development of disciplines (i.e. legally binding substantive rules) concerning qualification requirements and procedures, technical standards and licensing requirements. The standards included in paragraph 4 set a minimum that needs to be addressed by these disciplines, as is evident from the phrase '*inter alia*'.[319] Article VI:4 reads:

315 Delimatsis 2006b, p 18.

316 Delimatsis 2006b, p 32-33. Feketekuty describes due process as the opportunity to consult the government on the interpretation and application of regulations, to appeal regulatory decisions and to obtain a timely response to requests for regulatory decisions, Feketekuty 2000, p 229-230.

317 Thus Article VI:1 seems to apply to measures of general application while paragraphs 2, 3 and 6 apply to measures with a specific scope such as administrative decisions, Wouters and Coppens 2008, p 218. Measures of general application affect 'an unidentified number of economic operators' or 'a range of situations or cases, rather than being limited in their scope of application.', Delimatsis 2006b, p 20, referring to the interpretation provided in relation to the comparable GATT provision (Article X:3(a) in *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)* WT/DS24/R, 10 February 1997, par 7.65 and *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear)* WT/DS24/AB/R, 10 February 1997, par 21. The distinction between the substance of measures and their administration becomes problematic for substantive measures that are administrative in nature. According to the case-law on current Article X GATT, such measures are considered as administrative measures, Delimatsis 2006b, p 21-24. Administrative rulings in individual cases which provide criteria to be followed in future cases are also considered as measures of general application, *Japan – Measures Affecting Consumer Photographic Film and Paper (Japan - Film)* WT/DS44/R, 22 April 1998, par 10.388. VI:1 does not refer to the substantive content of domestic regulations, but only to their administration, US – Gambling Panel Report, par 6.432; S Wunsch-Vincent 'The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US-Gambling' (2006) 5 *World Trade Review*, p 388; Delimatsis 2006b, p 19. For a thorough analysis of these procedural rules, see Delimatsis 2006b, p 20-24, 28-31 and 31-35. See also: Wouters and Coppens 2008, p 217-219.

318 Delimatsis 2006b, p 47-48.

319 Delimatsis 2006b, p 18, the substance of Article VI was left for future negotiations as the work on the market access and national treatment provisions took precedence, see GATT Group of Negotiating on Services, Note on the Meeting of 10-25 July 1991, 28 August 1999, MTN.GNS/44, par 46. See also Krajewski 2003, p 132-134. The obligation contained in Article VI:4 will apply in general and not only to committed sectors to licensing, qualifications and technical standards (as is the case with the provisional application of these obligations through Article VI:5). Considering the far-reaching consequences, the negotiations were left for another day, Delimatsis 2006b, p 36-37.

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
>
> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

The mandate of Article VI:4 has led the Council for Trade in Services to establish a Working Party on Professional Services (WPPS), tasked with the development of multilateral disciplines in the accountancy sector.[320] The resulting Disciplines on Domestic Regulation in the Accountancy Sector were adopted but are not yet in force. The adoption of the Accountancy Disciplines will not take place before the conclusion of the Doha Round negotiations.[321] In contrast with the sector specific Accountancy Disciplines, the mandate is currently being used to negotiate horizontal Disciplines on Domestic Regulation within the Working Party on Domestic Regulation (WPDR).[322] As expressed in a note by the secretariat, the Accountancy Disciplines should not be seen as setting precedent but nevertheless constitute a helpful background for future work on Article VI:4.[323]

Article VI:5 provides for the provisional application of the requirements contained in the mandate of paragraph 4, but only in sectors where commitments have been inscribed. Article VI:5 provides:

> (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification

320 WTO Council for Trade in Services, Decision on Professional Services, 1 March 1995, S/L/3.

321 WTO Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, 17 December 1998, S/L/64, for clarity hereinafter referred to as the Accountancy Disciplines. While the Accountancy Disciplines are not in force, Members that have inscribed specific commitments on accountancy should 'to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines'. WTO Council for Trade in Services, Decision on Disciplines relating to the Accountancy Sector, 14 December 1998, S/L/63, par 2.

322 Replacing the WPPS, see for a detailed description of the negotiations relating to the Disciplines on Domestic Regulation: Wouters and Coppens 2008, p 220-253.

323 WTO Council for Trade in Services, Note by the Secretariat, Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services, 1 March 1999, S/C/W/96, par 6.

> requirements and technical standards that nullify or impair such specific commitments in a manner which:
> (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
> (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.
> (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations[324] applied by that Member.

Specific commitments may not be nullified or impaired through the application of domestic regulatory measures covering licensing, qualifications, or technical standards.[325] The listed criteria in VI:5(a) apply cumulatively.[326] Depending on what is considered 'reasonably expected' the effectiveness of Article VI:5 could be greatly reduced. As all domestic regulation within the meaning of this provision already in place when a commitment is undertaken could be seen as reasonably expected, this provision would not apply to such regulations.[327] This reading is also in line with the type of measures that are addressed by these provisional rules. As Article VI targets unnecessary non-discriminatory measures, it has a deregulatory effect. It seems logical that this effect will only apply once the Disciplines on Domestic Regulation are successfully negotiated. As such, the current provisional rules contain a standstill clause in relation to such measures, while allowing existing measures to continue to apply.

The implications of the domestic regulation obligation to Mode 4 are that immigration rules and labour market access rules, affecting specific commitments, must be administered in a reasonable, objective and impartial manner. Moreover, independent review is required, and, where appropriate, remedies for decisions affecting trade in services. Coupled with the requirement of transparency, this may

324 (Original footnote) The term 'relevant international organizations' refers to international bodies whose Membership is open to the relevant bodies of at least all Members of the WTO.

325 For a discussion concerning the concept of nullification or impairment, see Delimatsis 2006b, p 41-45.

326 That they apply cumulatively is apparent from the word 'and'.

327 This view is supported by Pauwelyn and considered viable by Delimatsis, see Pauwelyn 2005, p 167-168 and Delimatsis 2006b, p 40-41. This reading is also supported by a Secretariat Note: WTO (CTS) 1999a, par 11. Regarding existing commitments, this would entail that measures in place when the GATS entered into force in 1995 would be exempted from Article VI:5. However, as is apparent from discussion in the WPDR, not all Members agree to this reading, WTO Working Party on Domestic Regulation, Report on the Meeting Held on 1 July 2003, 22 September 2003, S/WPDR/M/22, par 16 and 30. For example: the Singapore representative expresses the opinion that this Article could be said to exempt pre-existing domestic regulation, while the Hong Kong, China representative expressed that the opposite could hold true as well: 'If, for example, a Member undertook a commitment on Mode 4 in a particular service sector, it would be expected that the Member eliminate procedures that would make it impossible for someone from abroad to have their qualifications certified.'

require a limitation of governmental discretion by laying down foreseeable legally binding rules.[328]

2.5.2 General obligations facilitating service liberalization

The GATS contains several provisions that apply irrespective of specific commitments. The obligation that should have a strong impact on national immigration law is the transparency obligation. While the other obligations, such as recognition of qualification requirements, may be very relevant in a specific case, such obligations do not affect the national policy areas investigated in this research.

Transparency regarding national measures and barriers to trade is an important prerequisite for international trade. Firstly, trade benefits from predictable rules and procedures. Secondly, transparency is a means towards awareness of possible discriminatory treatment or unnecessary procedures allowing for intervention whenever such treatment or procedures violate international trade obligations. Finally, transparency leads to an overview of national rules, possibilities for democratic control and public debates.[329] Differences in languages alone may provide obstacles, as do differences in legal systems. WTO Member States may have created a separate set of rules which relate specifically to GATS service provision, or they may have inserted the substance of the GATS liberalization into their legislation regulation economic activities by the self-employed. As service provision is heavily regulated, in manners which vary from state to state, providing a clear overview of the obligations that apply to service providers is all the more important.[330] Moreover, uncertainty regarding regulation and administrative practice may lead to alterations in the mode of supply. Delimatsis provides the example of service providers avoiding commercial establishment due to this regulatory uncertainty.[331] To this may be added that service providers prefer operating in a Member State that has a similar regulatory system and a similar language as its home state. International service trade would benefit from an overview of all rules that apply to the specific form of service provision liberalized in a commitment, for instance through government brochures which are regularly updated and the possibility to contact local authorities to answer questions. The importance of transparency is recognized in the GATS as it is included in the objectives listed in the preamble. According to Kruger it can even be argued that the GATS contribution to interna-

328 As will become apparent in chapters 5 and 6, the tendency to rely on policy guidance in the fields of immigration and labour market access may be problematic.

329 Krajewski 2003, p 124-125; P Delimatsis 'Article III GATS' in: R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 93 referring to a ECJ case which indicates the role transparency plays in facilitating trade in general: case C-41/00P *Interporc Im- und Export GmbH v Commission* ECLI:EU:C:2003:125, par 39.

330 Delimatsis 2008, p 93-95; GATS preamble, par 2.

331 See also Delimatsis 2008, p 93.

tional services trade rests on two key pillars, progressive liberalization through negotiation rounds and the principle of transparency.[332] Within the GATS framework, transparency addresses the needs of service providers and negotiators.[333] For the services negotiations, transparency allows negotiators to formulate their requests for commitments, as it provides an overview of regulatory barriers to trade.[334] For individual providers, transparency is important as it is difficult to access and understand regulations dealing with services of another WTO Member. Transparency is particularly important for those that have less capacity to investigate the legal regime that applies to service provision in their sector, thus individual service providers and small- and medium-sized enterprises have much to gain.[335]

To facilitate transparency, Article III GATS contains publication and notification requirements; Article IV:2 GATS obliges developed country Members, and other Members to the extent possible, to create information contact points for developing country Members; and Article VI:1-3 GATS contains transparency requirements regarding the application of national measures. Article III GATS provides that WTO Members must publish promptly, or in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application[336] pertaining or affecting the operation of the GATS.[337] Delimatsis explains that the measures 'affecting the operation of this Agreement' covered by the publication requirement is similar to the broad definition of the scope of the GATS which applies to measures 'affecting trade in services'.[338] Members must also respond to information requests regarding such measures made by other Members and to further facilitate the availability of relevant information, they must set up one or more enquiry points.[339] Paragraph 3 deals with the introduction of new, or changes to existing laws, regulations or administrative guidelines which significantly affect trade in services, when the affected trade is covered by specific commitments.[340] The effectiveness of enquiry points is limited by the fact that they are only useable by governments; individual service suppliers and civil society cannot request information from enquiry points.[341] Moreover, the enquiry points are often

332 P Kruger 'Managing the process of services liberalization' (2011) No S11TB09/2011 Trade Law Centre for Southern Africa Trade Brief, available online: <www.tralac.org>, p 7, available online: <www.tralac.org> (last visited 1 October 2015), p 2.

333 As explained by the Canadian representative during a meeting of the WPDR: Working Party on Domestic Regulation, Report on the Meeting Held on 22 June 2005, 6 September 2005, S/WPDR/M/30, par 20.

334 Kruger 2011, p 7.

335 Canadian representative WTO (WPDR) 2005a, par 20.

336 Laws, regulations and administrative guidelines, including those that do not directly address service provision but nevertheless affect trade in services, see this chapter: par 2.3.5.

337 Article III:1 GATS.

338 Delimatsis 2008, p 96, referring to Article III(1) and XXVIII(c) GATS and the interpretation of measures affecting trade in services by the Appellate Body in *EC – Bananas III* Appellate Body Report, par 220.

339 Article III:4 GATS.

340 Article III:3 GATS.

341 See more extensively: Delimatsis 2008, p 102-103.

formed by a single person within the trade or economy ministry and these are rarely updated.[342] Nevertheless, if effective, enquiry points can play an important role for GATS negotiations, as knowledge of current services regimes is crucial when making a request for commitments.[343]

During a meeting of the WPDR, the delegation of Canada drew attention to the importance of transparency in relation to Mode 4. As explained by the representative: transparency is important for trade negotiators and for service providers, 'in particular individual service providers and small- and medium-sized enterprises, to understand the horizontal Mode 4 commitments in Member's schedules'.[344] In a communication to the WPDR Canada suggested that all WTO Members would provide relevant information sources so that interested parties received more detailed information regarding that Member's Mode 4 commitments. This information would be similar to that provided by enquiry points, but the proposal suggested that all WTO Members would simultaneously share this information when making Mode 4 commitments.[345] The Communication from Canada provides a template which adds columns to the horizontal commitment containing information on the relevant law and regulations, administrative guidelines and other public information such as government brochures concerning temporary working in Canada as a migrant.[346]

As indicated above, Article VI GATS requires Members to ensure that measures of general application are administered in a reasonable, objective and impartial manner. Regarding specific administrative decisions, Members are required to provide independent review. Moreover, where appropriate, remedies for decisions that affect trade in services must be provided. Finally, transparency and due process are required in procedures where a service supplier has made a request for authorization.[347]

342 International Centre for Trade and Sustainable Development 'Cross-border trade in services: Barriers and opportunities in EU services markets for ACP exporter' (2010) 9:9 *Trade Negotiations Insights* available online: <http://ictsd.org/i/competitiveness/94184/> (last visited 1 October 2015); OECD Trade Directorate Trade Committee, Working Party of the Trade Committee *Strengthening Regulatory Transparency: Insights for the GATS from the Regulatory Reform Country Reviews* (1999) 43 Working Paper TD/TC/final, par 26-30. As noted by Delimatsis, from the meeting report of the WPDR held on 24 September 2004 it appears that until that date only one request had been made to the EU contact point, Delimatsis 2008, p 103; WTO Working Party on Domestic Regulation, Report on the Meeting Held on 24 September 2004, 15 November 2004, S/WPDR/M/27, par 16, see also par 21.

343 Kruger 2011, p 7

344 WTO (WPDR) 2005a, par 20.

345 WTO (WPDR) 2005a, par 20; the proposal itself is contained in: WTO Working Party on Domestic Regulation, Communication from Canada Transparency Template – Canada's Revised Horizontal Mode 4 Offer, 20 May 2005, 25 May 2005, S/WPDR/W/33.

346 WTO (WPDR) 2005b.

347 See extensively: this chapter, par 2.5.1.3.

2.5.3 Exceptions to GATS obligations

Trade-restrictive measures are often required in order to ensure the protection of various societal values and public interests. Considering the potential reach of the GATS, the pursuance of these objectives could be significantly restricted.[348] However, the GATS contains several provisions which permits deviation from the Agreement for various reasons.[349] Of these exceptions Article XIV contains general exception grounds that may be relevant to exempt measures connected to immigration law. Additionally, the Annex MNP provides specific exemptions relating to Mode 4.

2.5.3.1 General exceptions

As the schedules of specific commitments and all other annexes are an integral part of the GATS, the terminology used in these provisions ('nothing in this Agreement shall be construed') indicates that Articles XIV can be invoked as an exception to general obligations, specific commitments and the annexes.[350]

Article XIV reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> (a) necessary to protect public morals or to maintain public order;[351]
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
>
> (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
>
> (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
>
> (iii) safety;

348 On the scope of GATS see this chapter, par 2.3.5; Van den Bossche and Zdouc 2013, p 543-544; T Cottier, P Delimatsis and NF Diebold 'Article XIV GATS General Exceptions' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 290.

349 See for an overview of the GATS exceptions: Van den Bossche and Zdouc 2013, chapters 7-9.

350 Article XX:3 and XXIX GATS.

351 (Original footnote) The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective[352] imposition or collection of direct taxes in respect of services or service suppliers of other Members;
(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Of the general exception grounds, the protection of public order in cases of a genuine and sufficiently serious threat posed to one of the fundamental interests of society is relevant to the topic at hand.[353] Article XIV is modelled after Article XX GATT and contains similar language. As trade in services often has an impact on domestically sensitive issues, the GATS exceptions are more elaborate and more broadly formulated than their GATT counterparts. Though the number of policy grounds is more limited, the public order justification provided for in lit. a provides a considerable margin for regulatory autonomy.[354] As Article XX GATT was used as the model for Article XIV GATS, interpretations of Article XX GATT provided by the dispute settlement bodies can be applied in analogy. In *US – Gambling* this approach of analogous interpretation was specifically applied between Articles XX GATT and XIV GATS.[355]

The introductory clause (chapeau) of Article XIV provides the conditions for the five justification grounds contained in the following paragraphs of Article XIV. The first three of these grounds can only be invoked when they are deemed necessary to achieve the end contained in each respective paragraph. The last two

352 (Original footnote) Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Member under its taxation system which:
(i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Member's territory; or
(ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Member's territory; or
(iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
(iv) apply to consumers of services supplied in or from the territory of another Member in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Member's territory; or
(v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
(vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Member's tax base.
Tax terms or concepts in paragraph (d) of Article XIV and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Member taking the measure.

353 The public morals ground does not seem relevant here. See for a thorough discussion on this ground JC Marwell 'Trade and Morality: The WTO Public Morals Exception after Gambling' (2006) 81 *New York University Law Review*, in particular p 815-815.

354 Cottier, Delimatsis and Diebold 2008, p 291-292.

355 Matsushita, Schoenbaum and Mavroidis 2006, p 635 and Ortino 2008, p 187. *US – Gambling* Panel Report, par 6.448; see also *EC – Bananas III* Panel Report, par 231.

grounds must simply be appropriate to secure the stated objective. While the first three grounds allow for deviation from any GATS provision, the last two grounds only allow deviation from specifically mentioned provisions, respectively national treatment and MFN.[356] The *US – Gambling* case confirms the two-tier test developed by the WTO dispute settlement bodies on the basis of Article XX GATT. First, a measure must fall within the scope of one of the recognized exceptions set out in paragraphs (a) to (e) of Article XIV in order to enjoy provisional justification. If the measure in question indeed fulfils the requirements set out in one of these paragraphs then the measure must meet the requirements contained in the chapeau of Article XIV.[357] Article XIV creates a justification regime that allows for some regulatory measures pursuing a closed list of policy objectives.[358] It can be argued that an open-ended *Cassis de Dijon*-type of list of legitimate public interests would have been more logical. While it is true that Members decide which service sectors they subject to the specific obligations of the GATS, in the long term the intention is to progressively negotiate additional commitments under Article XVI and XVII. Therefore, a development similar to that under EU law can reasonably be expected.[359]

The second part of the two-tier test is formed by the conditions contained in the chapeau of Article XIV which are aimed at the prevention of misuse of the exceptions and the protection of the rights accorded to other Members. The chapeau of Article XX GATT contains almost identical language and has a similar function. Therefore, case law concerning the introductory clause of Article XX GATT can be applied in analogy to Article XIV GATS.[360] While the subparagraphs address the substance of the measure for which justification is sought, the chapeau addresses the application of that measure. According to case law this refers to general application guidelines and the actual application practice.[361] The Appellate Body has interpreted the chapeau as establishing three cumulative standards: unjustifiable discrimination between countries where the same conditions prevail; arbitrary discrimination between countries where the same conditions prevail; and disguised

356 Matsushita, Schoenbaum and Mavroidis 2006, p 635.

357 US – Gambling Panel Report, par 6.448-6.449; *US – Gambling* Appellate Body Report, par 292. See also NF Diebold 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2008) 11 *Journal of International Economic Law*, p 45-47. Diebold issues a warning not to simplify the conditions imposed by Articles XIV GATS and XX GATT as the two-tier test does not do justice to the complexity of the analysis required, Diebold 2008, p 47-48. See also Cottier, Delimatsis and Diebold 2008, p 294-296.

358 Krajewski 2003, p 160; Cottier, Delimatsis and Diebold 2008, p 296-298.

359 Chapter 3, par 3.5.3; See also Cottier, Delimatsis and Diebold 2008, p 297-298.

360 See regarding the chapeau of Article XX GATT: *United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline)* WT/DS2/AB/R and WT/DS4/AB/R, 20 May 1996, section IV. The two differences in wording between the chapeau of the GATT and the GATS general exception clauses are not significant, see in detail: Matsushita, Schoenbaum and Mavroidis 2006, p 635. See also Cottier, Delimatsis and Diebold 2008, p 321.

361 Krajewski 2003, referring to WTO Committee on Trade and Environment, GATT/WTO Dispute Settlement Practice Relating to GATT Article XX Paragraphs (b), (d) and (g), 8 March 2002, WT/CTE/W/203, par 65; see also Diebold 2008, p 67.

restriction on trade.[362] These three standards can entail both substantive and procedural requirements and can overlap.[363]

2.5.3.2 Mode 4 exceptions

The Annex MNP provides several exceptions in relation to Mode 4. As indicated in paragraph 2 of the Annex, the GATS does not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis. Thus, permanent residence and employment are not part of the scope of the GATS. Consequently, neither the national treatment obligation, nor the MFN obligation, will apply to such measures and GATS Mode 4 service suppliers may be excluded from them. Paragraph 4 of the Annex moreover indicates that 'measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders' are exempted from the Agreement as well. However, this carve-out for immigration rules is limited by the condition that the application of such measures may not lead to nullification or impairment of specific commitments. The footnote to this paragraph provides one clue regarding the scope of this exemption and the nullification and impairment limitation: the sole fact of requiring a visa for natural persons of certain Members and not for those of others (which would breach the MFN obligation) shall not be regarded as nullifying or impairing benefits under a specific commitment.

General measures of border control, including verification measures (the obligation to demonstrate a passport) will be unproblematic from a GATS perspective. Yet, immigration restrictions relating to past criminal behaviour will be more problematic.[364] It seems doubtful that such restrictions are required to regulate entry, temporary stay or ensuring orderly movement. In any case, if a criminal conviction leads to refusal of entry, this will nullify or impair a specific UK commitment if the service provider fulfils the conditions of that commitment. Similarly, the Netherlands may impose a certificate of good conduct requirement in relation to certain activities. Such certificates can be refused on the basis of past criminal conduct.[365] That the interplay between commitments, the GATS obligations and this exemption can become complicated may be apparent from the following example. As is clear from paragraph 1 of the Annex MNP, service providers must ei-

362 *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia (US – Shrimp (Article 21.5 – Malaysia))* WT/DS58/AB/RW, 22 October 2001, par 150; Panel Report on *US – Gambling*, par 6.581.

363 Cottier, Delimatsis and Diebold 2008, p 322.

364 See chapter 7, par 7.5.3.

365 This issue serves as an example; chapters 5 and 6 will discuss the specific implementation of GATS Mode 4 obligations in the Netherlands and UK legal order.

ther be self-employed, or already employed in the host state. A pre-employment period of one year forms one of the conditions incorporated in the EU horizontal Mode 4 commitment.[366] As such, this condition may be imposed on the basis of the commitment itself, as it was specifically left unbound. As will become apparent in chapters 5 and 6, the Netherlands and the UK require proof of pre-employment in their national legislation. Demanding such proof will probably lead to administrative formalities which are not imposed on national service providers. A valid question is whether the obligation to submit documents to verify employment should be seen as part of the carve-out in the commitment itself, or part of the immigration rules which contain general obligations to submit documents in order to verify the fulfilment of conditions imposed on immigrants. If the latter is the case, then the exemption may justify this condition. It may be assumed that the requirement of proof does not nullify or impair the commitment, as that commitment includes a pre-employment condition.

2.5.4 Post-Uruguay negotiations, and the Doha Round

For several services sectors negotiations on the exchange of liberalization commitments could not be concluded before the end of the Uruguay Round negotiations. Negotiations on basic telecommunications, financial services, maritime transport services and the movement of natural persons were therefore extended. In addition to these extended Uruguay Round negotiations on commitments, the GATS requires Members to undertake negotiations on the development of new rules and disciplines as well as negotiations to extend liberalization during future rounds. This requirement is reflected in several GATS provisions containing negotiation mandates, of which the Disciplines on Domestic Regulation (Article VI:4) are relevant for this research. Negotiations aimed at the increase of commitments are often referred to as market access negotiations. Although the term market access is used to denominate the type of obligation contained in Article XVI, 'negotiations on market access' refers to commitments under all provisions on specific commitments (XVI, XVII and XVIII GATS) as the concept broadly relates to increased access to markets.[367] Article XIX GATS commits Members to enter into successive rounds of liberalization negotiations. Article XIX:1 indicates that new services negotiations are aimed at the achievement of a progressively higher level of liberalization through effective market access. These services negotiations should have commenced no later than five years from the date of entry into force of the WTO Agreement and therefore the services market access negotiations offi-

366 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal commitment Mode 4, at iii.

367 I will use the term 'rules negotiations' for negotiations on the rules, or disciplines of the GATS and the term 'market access' negotiations for negotiations on specific commitments.

cially started in January 2000.[368] The mandates regarding rules and increased market access are often referred to as the 'built-in' agenda. The services negotiations based on this built-in agenda is called the 'Services 2000 negotiations' (or 'talks').[369]

2.5.4.1 Market access and problems of the 'single undertaking approach'

The Services 2000 negotiations are now part of the ninth GATT/WTO negotiation round, which is the first WTO negotiation round. In 1999, an initiative to launch the new round during the Seattle Ministerial Conference failed. Two years later, in November 2001, the new round was officially launched by the Doha Ministerial Conference. In accordance with the 'single undertaking' approach, the services negotiations were incorporated in the Doha Round negotiations.[370] The Doha Ministerial Declaration contains a specific timeline for the conclusion of the services negotiations. However, the timeline, set to conclude in 2005, was not met.[371] The Doha Round services negotiations are different in substance and nature as the aim is now to extend liberalization and complement the GATS rules, where the Uruguay Round left them incomplete.[372] Studying the negotiation process and the submitted offers and revised offers in the current Doha Round of trade negotiations demonstrates little progress regarding services trade liberalization in general, and Mode 4 in specific.[373] However, offers made during a negotiating round do not bind WTO Members, thus until the round is completed, changes might occur.[374]

The single undertaking approach, often referred to as 'nothing is agreed until everything is agreed', has the main advantage that concessions can be traded in sectors that are unrelated. A Member may accept services concessions in exchange

368 Leal-Arcas 2008, p 45-46. The WTO Agreement entered into force on 1 January 1995, see also: Jackson 1998, p 30.

369 Leal-Arcas 2008, p 46.

370 The Declaration recognized the progress already achieved and reaffirmed the guidelines and procedures for the negotiations, WTO, Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/Dec/1, par 15. See also Leal-Arcas 2008,p 46-47.

371 Doha Ministerial Declaration, par 15.

372 Leal-Arcas 2008, p 10-11; P Delimatsis 'The Principle of Necessity in the WTO, Lessons for the GATS Negotiations on Domestic Regulation' (2014) 04 Tilburg Law School Legal Studies Research Paper Series, available online: <www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/research/publications/discussion-papers/2013/> (last visited 1 October 2015), p 1.

373 R Adlung and M Roy 'Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change' (2005) 39 *Journal of World Trade*, p 1162; see also the report on the Services Signalling Conference: WTO Trade Negotiations Committee, Services Signalling Conference, Report by the Chairman of the Trade Negotiations Committee, 30 July 2008, JOB(08)/93. The Signalling Conference, organized during the 2008 WTO mini-ministerial meeting was held to examine willingness of negotiators to provide new services commitments. Details in relation to Mode 4 offers made by the Netherlands and the UK will be provided in chapters 5 and 6.

374 WTO (TNC) 2008 (Services Signalling Conference), par 4.

for increased agricultural market access.[375] Moreover, the single undertaking approach is essential during the implementation phase 'to guarantee the value of the reciprocal concessions made during the negotiations, lest the overall balance shift afterwards'.[376] A huge disadvantage lies in the fact that all Members need to agree on the entire package.[377] This prevents reaping the outcome of successful negotiations in specific areas. As was the overall impression provided by negotiators during a mini-ministerial held in 2008, agreement was reached on most topics before the negotiations collapsed due to a few specific issues.[378] On the basis of the single undertaking approach, both the rules negotiations and the market access negotiations will not be concluded without an all-encompassing conclusion for all topics under negotiation in the Doha Round. Due to the inability to reach agreement, the Doha Round has been declared 'dead' on many occasions, both by commentators and by negotiators.[379]

Nevertheless, in December 2013, some progress was reached during the Bali ministerial meeting. Interestingly, the Bali agreement, which mostly contains non-binding declarations, does include a step forward on the issue of trade facilitation. This step should not be overestimated as the Bali Agreement merely opens ratification of the Trade Facilitation Agreement, which was already created during the Uruguay Round.[380] Signifying the difficulties of the WTO negotiations, India later expressed its unwillingness to implement the achievement made with the Bali Agreement, but this matter was resolved at the end of 2014.[381] The Bali Agreement does not touch upon the most difficult issues of the Doha negotiations, which are agriculture, industrial tariffs and services. These issues are, in the words of WTO Director-General Azevedo, interconnected, agreement is therefore required in all three of these sectors.[382] While Bali has demonstrated the possibility of reducing

375 M Kennedy 'Two Single Undertakings – can the WTO Implement the Results of a Round?' (2001) 14:1 Journal *of International Economic Law*, p 79 and 80-81. *Brazil – Measures Affecting Dessicated Coconut (Brazil – Dessicated Coconut)* WT/DS22/AB/R, 20 March 1997, par 12.

376 Kennedy 2001, p 81.

377 The reality is more complicated as not all Members are as involved in the process as this remark may suggest. Especially developing countries simply lack the manpower to follow all different topics during the negotiations, see for example: Adlung and Roy 2005, p 1164. Many countries combine their wishes during the negotiations, sometimes allowing larger Members to guide them as to what is in their interest. An example can be found in India that has forwarded itself as striving for developing countries interests.

378 International Centre for Trade and Sustainable Development 'WTO Mini-Ministerial Ends in Collapse' (2008) 10 Bridges Daily Update, 30 July 2008, available online: <www.ictsd.org> (last visited 1 October 2015).

379 Trebilcock, Howse and Eliason 2013, p 615.

380 WTO, Bali Ministerial Decision, 7 December 2013, WT/MIN(13)/Dec, Trade Facilitation Agreement; see also the speech WTO Director General Roberto Azevedo of 8 November 2014, available online: <www.wto.org> (last visited 1 October 2015).

381 WTO General Council, Agreement on Trade Facilitation, 28 November 2014, WT/L/940.

382 Speech WTO Director General Roberto Azevedo of 12 February 2014, available online <www.wto.org> (last visited 1 October 2015). In general, developed countries are prepared to reduce agricultural tariffs as a trade-off for the opening of services markets by developing countries, International Centre for Trade and Sustainable Development 'Services Signalling Conference set for Ministerial Week' (2008) 12:25 Bridges.

the strictness of the single undertaking approach,[383] it is highly doubtful that agreement on these three core issues will be reached before the negotiations are indeed fully completed.[384] As such, the single undertaking approach will most likely apply in relation to the services negotiations.

An additional problem is that many (developing) countries simply lack the institutional capacity to deal with the negotiations on the basis of the single undertaking approach.[385] Moreover, the approach requires the integration of the entire outcome of the Doha Round, including the result of negotiations on disciplines (such as the Disciplines on Domestic Regulation) into the WTO Agreement, which in itself was the result of a single undertaking. As rightly noted by Kennedy, this procedure will be complicated indeed.[386]

The Doha Round deadlock has led to negotiations on the Trade in Services Agreement. A group of WTO Members, calling themselves the Really Good Friends of Services, initiated talks in 2012 to advance the services negotiations.[387] In 2015 this group consists of fifty-one WTO Members, including the EU Member States.[388] A draft text, based on an EU proposal from 2013, is available. The proposal copies the general provisions of the GATS, yet its coverage will be different.[389] Negotiations aim towards a hybrid approach in relation to specific commitments. TiSA adopts a positive list approach regarding the market access obligation, whereas commitments relating to the national treatment obligation will follow a negative list approach. Thus, the national treatment commitment will apply unless explicitly indicated in a schedule, whereas the market access approach follows the current GATS approach, unbound unless explicitly scheduled.[390]

An important issue is the constitutional structure of TiSA. In essence this issue relates to the wish of its negotiators to move ahead with trade in services liberalization. This might be done within the framework of the WTO or it might take the form of a FTA separate from the WTO. The participating states emphasize the importance of an agreement that will first form a preferential plurilateral agreement on services, which should in the future be multilateralized fully within the WTO

383 An approach explicitly adopted by the 2011 Ministerial conference in Geneva, WTO, Geneva Ministerial Conference, Elements for Political Guidance,1 December 2011, WT/MIN(11)/W/2.

384 Speech of WTO Director General Roberto Azevedo of 12 February 2014.

385 SE Rolland 'Redesigning the Negotiation Process at the WTO' (2010) 13:1 *Journal of International Economic Law*, p 72-73. Rolland provides an excellent account of the problems related to the single undertaking, in particular in relation to developing country interests, as well as alternative approaches.

386 Kennedy 2001, p 82.

387 S Yi Peng 'Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next version of GATS?' *Hong Kong Law Journal* (2013) 43:2, p 614.

388 W Schöllman *Economic Significance of Trade in Services Background to Negotiations on a Trade in Services Agreement* (European Parliamentary Research Services February 2015), p 1, available online through the website of the European Parliament: <http://www.europarl.europa.eu/> (last visited 1 October 2015).

389 Proposal by the European Union 'Plurilateral Service Agreement Draft Text Provisions, Explanatory Note' (2013) available online:
<http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152687.pdf> (last visited 1 October 2015).

390 Yi Peng 2013, p 622-623.

framework.[391] This still leaves several options which mainly revolve around the issue of MFN. TiSA will likely first take the form of an exemption to the MFN principle, as the liberalization reached by its members will otherwise simply be available to all other WTO Member States, which raises issues of reciprocity. Thus, TiSA must either comply with Article V of the GATS, having substantial sectoral coverage and providing for the absence or elimination of substantially all discrimination.[392]

2.5.4.2 Unfinished rules, Disciplines on Domestic Regulation

With the drafting and adoption of the GATS, the Uruguay Round created a multilateral system of trade rules and disciplines for trade in services. However, the GATS framework is incomplete and several important issues are either not included or are incorporated in rudimentary form. This includes the potentially most intrusive GATS obligation, the provision on Domestic Regulation incorporated in Article VI. The provisionally applying rules are to be replaced with Disciplines on Domestic Regulation.[393] As these disciplines will likely consist of a necessity, or a least-restrictive test targeted at non-discriminatory measures, the disciplines potentially have a strong impact on regulatory autonomy. This is also apparent from the fact that Members could not agree on the content of the Domestic Regulation provision during the Uruguay Round. Additionally, the Uruguay Round commitments will logically be subject to the Disciplines on Domestic Regulation, as will the Doha Round commitments. The importance of the negotiations on these rules is therefore significant.

In order to facilitate negotiations on new rules and disciplines, the Council for Trade in Services (CTS) has set up so-called working parties.[394] The Working Party on Professional Services was created to develop rules on domestic regulation in the accountancy sector.[395] After completion and adoption of the resulting Disciplines on Domestic Regulation in the Accountancy Sector it was decided to change the sector-specific approach and to start working on horizontal Disciplines on Domestic Regulation. Members preferred to develop horizontal disciplines first, which then can be used as a basis for additional disciplines for specific services or service sectors.[396] Having fulfilled its mandate, in 1999 the WPPS was replaced with the

391 H Godsoe 'The Depth of the Trade in Services Agreement' *Brigham Young University International Law and Management Review* (2014) 10:1, p 12-13; Yi Peng 2013, p 616-617; EU Commission website on TiSA: <http://ec.europa.eu/trade/policy/in-focus/tisa/> (last visited 1 October 2015).

392 Yi Peng 2013, p 618-619; see also H Godsoe 'The Depth of the Trade in Services Agreement' *Brigham Young University International Law and Management Review* (2014) 10:1, p 12-14.

393 This chapter, par 2.5.1.3.

394 The CTS may establish subsidiary bodies on the basis of Article XXIV:1 GATS.

395 WTO Council for Trade in Services, Decision on Professional Services, 1 March 1995, S/L/3, par 1. Due to the amount of commitments in the accountancy sector, priority was given to the development of disciplines for that sector, par 2.

396 J Arkell *GATS and Domestic Regulation Disciplines and Sustainable Development Principles and Operational Concepts: The Challenges* (ICTSD, Geneva 2006), available online: <www.ictsd.org>, p 46; Krajewski indicates that →

Working Party on Domestic Regulation, charged with the creation of horizontal Disciplines on Domestic Regulation.[397]

The structure of the GATS differentiates between measures that limit market access for foreign services and service suppliers and measures that are aimed at public policy objectives. This distinction is incorporated through Articles XVI and XVII on the one hand, and Article VI on the other.[398] Non-discriminatory domestic regulations are presumed to address the quality of services and the qualifications of service providers and therefore are in principle allowed. The aim of Article VI GATS is to target unnecessary impediments to international trade caused by such non-discriminatory domestic regulations. As it is impossible to categorically classify regulatory interventions as either restricting trade or not restricting trade, Article VI requires the measure in question to be the least-trade restrictive.[399] This division between Articles VI, XVI and XVII is often referred to as a three-pronged approach. Articles XVI and XVII target market access restrictions and discriminatory measures and Article VI complements this approach by targeting unnecessary non-discriminatory domestic regulation.[400] This least-trade restrictive regime regarding domestic regulation is still the subject of negotiations. As indicated by Nicolaïdis and Trachtman, during the Uruguay Round the negotiating parties could not agree on restrictions on their national regulatory sovereignty based on the unspecific concept of necessity. It was therefore decided to insert a mandate for future negotiations on Disciplines on Domestic Regulation in Article VI:4. Before these disciplines are created the regime of Article VI:5 applies which establishes several provisional conditions applying to licensing and qualification procedures and requirements and technical standards.[401]

Separating legitimate domestic regulation from unnecessary trade restrictive domestic regulation is no easy task as trade in services tends to be regulated by a large number and widely varying range of regulatory barriers. Moreover, measures

in particular developing countries prefer horizontal disciplines as these presumably are less restrictive on domestic regulatory autonomy. Nevertheless, some proposals for sector specific disciplines have also been submitted, Krajewski 2008, p 183. WTO Working Party on Domestic Regulation, Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors, 6 September 2005, S/WPDR/W34; WTO Working Party on Domestic Regulation, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Transparency Disciplines on Domestic Regulation in the Telecommunications Sector, 14 September 2005, S/WPDR/W/36.

397 WTO Council for Trade in Services, Decision on Domestic Regulations, 28 April 1999, S/L/70. See for a detailed description of the negotiations relating to the Disciplines on Domestic Regulation: Wouters and Coppens 2008, p 220-253.

398 These provisions and their interaction are extensively discussed in S Tans 'The GATS Approach Towards Liberalization' (2009) 11 Centre for Trade and Economic Integration Working Paper, available online: <http://graduateinstitute.ch/home/research/centresandprogrammes/ctei/working_papers.html> (last visited 1 October 2015).

399 P Low and A Mattoo 'Is There a Better Way? Alternative Approaches to Liberalization under GATS' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000), p 455.

400 For example Feketekuty 2000, p 101 referring to the approach as a 'three-legged stool'.

401 Nicolaïdis and Trachtman 2000, p 258-259.

affecting trade in services are often not applied at borders. This renders the helpful presumption available when dealing with trade in goods, that border measures are presumed protectionist and non-discriminatory domestic regulations are presumed non-protectionist, less useful in the context of trade in services.[402] As often indicated, the GATS provisions have to strike a delicate balance between the preservation of legitimate trade regulation falling within the sovereign right of Members to regulate on the one hand, and trade liberalization and the abolition of protectionist and unnecessary barriers to trade in services on the other.[403] This balance needs to be maintained in the provisions of Disciplines on Domestic Regulation.[404]

Accountancy Disciplines

In addition to their relevance in the accountancy sector, the Accountancy Disciplines constitute a helpful background for future work on Article VI:4.[405] Consequently, the Accountancy Disciplines provide an indication to the outcome of the negotiations on the horizontal Disciplines on Domestic Regulation. The Disciplines on Domestic Regulation in the Accountancy Sector were adopted but their entry into force will not take place before the conclusion of the Doha Round negotiations.[406] Even before adoption, Members should 'to the fullest extent consistent with their existing legislation, not take measures which would be inconsistent with these disciplines'.[407] The application of the Accountancy Disciplines is limited to Members that have inscribed specific commitments on accountancy.[408] Moreover, the Accountancy Disciplines are limited to measures that do not fall under Article XVI and Article XVII.[409]

The Accountancy Disciplines provide for a general necessity test. This test requires that measures relating to qualification requirements and procedures, technical standards and licensing (QTL) are not more trade-restrictive than necessary

402 Tans 2009, par 2.3.

403 See for example: Wouters and Coppens 2008, p 207; Delimatsis 2006b, p 15; Pauwelyn 2005, p 133; M Djordjevic 'Domestic Regulation and Free Trade in Services – A Balancing Act' (2002) 29 *Legal Issues of Economic Integration*, p 305-306.

404 See for a thorough discussion of the conflict between these two GATS objectives: Krajewski 2003, p 56-62. Krajewski indicates that due to the wide reach of the GATS and thus the potential reach of the international trading system national regulatory autonomy should prevail over trade liberalization when interpreting GATS provisions, Krajewski 2003, p 62.

405 WTO (CTS) 1999a, par 6.

406 WTO (CTS) 1998a, for clarity hereinafter referred to as the Accountancy Disciplines. Provisions in the Accountancy Disciplines are referred to as paragraphs, not Articles. WTO (CTS) 1995, see for a brief overview of the most important aspects of the Accountancy Disciplines: Wouters and Coppens 2008, p 224.

407 WTO (CTS) 1998c, par 2.

408 WTO (CTS) 1998c, par 1.

409 Accountancy Disciplines, par 1, see also WTO (WPPS) Discussion of matters relating to Articles XVI and XVII of the GATS in connection with the Disciplines on Domestic Regulation in the accountancy sector, Informal note by the Chairman, JOB 6496, 25 November 1998. This document is attached to WTO (WPPS) 1998, Report to the Council for Trade in Services on the development of Disciplines on Domestic Regulation in the accountancy sector, S/WPPS/4 ,10 December 1998; Tans 2009, par 3.1.

to fulfil a legitimate objective. This provision is significant as it subjects every regulatory measure in the accountancy sector to scrutiny for necessity.[410] As Article VI:4 only refers to the quality of the service, the inclusion of this open ended list of legitimate objectives is an important addition, as the necessity test in the Accountancy Disciplines can be fulfilled based on other policy goals than the quality of the service.[411] Besides the necessity test, several provisions are included which relate to transparency, elaborating the GATS rules on transparency contained in Articles III and VI. Finally, the Accountancy Disciplines contain five sets of specific rules for QTL. These specific rules provide details regarding the necessity test for each of the QTL categories regarding certain types of measures.[412] However, some of these specific rules contain language weaker than the language in the necessity test.[413]

Horizontal Disciplines on Domestic Regulation

The WPDR is working on 'necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services'. The mandate includes the previous tasks assigned to the WPPS to develop general disciplines for professional services.[414] The mandate contained in Article VI:4 is slightly different as that refers to the development of measures relating to qualification requirements and procedures, technical standards and licensing requirements, thus omitting licensing procedures. However, licensing procedures should be considered part of the mandate. Article VI:4(c) does refer to licensing procedures. Moreover, they were included in the Accountancy Disciplines.[415]

The measures covered by these disciplines will be licensing and qualification requirements and measures relating to technical standards. The draft disciplines provide the following definitions of these measures:[416]

410 Krajewski 2008, p 182.

411 Krajewski 2008, p 182, referring to Delimatsis in Sauve 2008.

412 For example par 10 of the Accountancy Disciplines states that Members shall ensure that terms for Membership are reasonable when they require Membership of a professional organization as a condition for accountancy service providers to obtain a licence to provide their services.

413 Wouters and Coppens 2008, p 225, referring to C Trolliet and J Hegarty 'Regulatory Reform and Trade Liberalization in the Accountancy Sector' in A Mattoo and P Sauvé (eds) Domestic Regulation and Service Trade Liberalization (World Bank and Oxford University Press, Washington DC 2003), p 152. They provide the example of paragraph 9 on the licensing requirement of residency that Members 'shall consider' whether less trade restrictive means could be used to achieve the same policy objective, which is obviously less strong than the phrase 'shall ensure' incorporated in paragraph 2.

414 WTO (CTS) 1999b, par 2. See also WTO (CTS) 1998c, par 2.

415 Wouters and Coppens 2008, p 226. Similarly, in the chapeau of Article VI:5 the word 'procedures' is omitted, thus the provision seems not to apply to licensing and qualification procedures. As explained by Delimatsis, this should not be regarded as an intentional omission, see P Delimatsis *Necessity, Transparency, and Regulatory Diversity in Trade in Services* (Oxford University Press, Oxford 2007) p 118-119.

416 WTO Working Party on Domestic Regulation, Draft Consolidated Text in the WPDR, 11 July 2006, JOB(06)/223.

> 'Licensing requirements' are substantive requirements, other than qualification requirements and technical standards, with which a service supplier is required to comply in order to obtain or renew authorization to supply a service.[417]
> 'Licensing procedures' are administrative or procedural rules relating to the administration of licensing requirements for the supply of a service, including those relating to submission and processing of an application for a licence or renewal thereof.
> 'Qualification requirements' are substantive requirements relating to the competence to supply a service that a service supplier is required to demonstrate prior to obtaining authorization to supply a service.[418]
> 'Qualification procedures' are administrative or procedural rules relating to the administration of qualification requirements, including those aiming at verifying the compliance of candidates with qualification requirements as well as those relating to acquiring or supplementing such qualifications.
> 'Technical standards' are measures that lay down the characteristic of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards.[419]

While formally the mandate contained in Article VI:4 GATS is separate from the Doha Round negotiations, Members of the WPDR have repeatedly expressed that the WPDR negotiations are connected to the overall development in the DDA. This connection was also included in the 2001 Guidelines and Procedures for the Negotiations on Trade in Services.[420] The Hong Kong Ministerial Declaration provides a mandate to conclude the WPDR negotiations by the end of the Doha Round.[421]

Opinions among participating Members were divergent on the substance of the disciplines. Roughly speaking, some Members preferred including substantive disciplines, in particular a necessity test.[422] These substantive disciplines were to be

417 Delimatsis indicates that such measures would cover rules for obtaining or maintaining an authorization so supply a service, Delimatsis 2014, p 4.

418 As noted by Delimatsis, such measures would typically relate to issues of competence of a supplier, Delimatsis 2014, p 4.

419 Delimatsis provides that these measures relate to requirements and technical specifications of the resources and facilities required for the service, the terminology used an the information to be disclosed. Such measures ensure the quality of the service, Delimatsis 2014, p 5.

420 WTO Council for Trade in Services, Guidelines and Procedures for the Negotiations on Trade in Services, 29 March 2001, S/L/93, par 7, see also Krajewski 2008, p 180.

421 WTO Working Party on Domestic Regulation, Report of the meeting held on 16 June 2008, 18 June 2008, S/WPDR/M/38, par 7 and WTO Working Party on Domestic Regulation, Report of the meeting held on 26 November 2008, 10 December 2008, S/WPDR/M/39, par 6-7. Hong Kong Ministerial Declaration, Annex C objective 5. It is unlikely that the Disciplines on Domestic Regulation would be supported 'at home'. It will be very difficult to convince domestic stakeholders to accept the disciplines without deals reached on, for instance, agriculture in the Doha Round negotiations.

422 WTO Working Party on Domestic Regulation, Communication from Australia; Chile; Hong Kong, China; Korea; New Zealand and the separate customs territory of Taiwan, Pengu, Kinmen and Matsu, Article VI:4 disci- →

combined with Special and Differential treatment (S&D) for developing countries. Other Members objected to the inclusion of a necessity test of a horizontal nature and proposed a more minimalist approach focussing on transparency, and disciplines on licensing and qualification procedures.[423] Moreover, the US and EU seem reluctant to extend S&D to countries other than Least Developing Countries (LDCs).[424] While negotiations intensified, these diverging opinions prevented the preparation of a draft negotiating text. Proposals had been submitted regarding all the topics dealt with in the Accountancy Disciplines[425] and agreement was growing regarding a framework of core elements such as scope, coverage and definitions. Nevertheless, some Members refused to go beyond the adoption of domestic regulatory disciplines that address more than transparency issues, thus effectively stalling the drafting process.[426]

To my knowledge, negotiations in 2015 are based on a third[427] Chairperson's draft, circulated on 20 March 2009.[428] Referring to the text of the second draft, Krajewski notes that while the draft did not reflect consensus, it is likely that a final version will not deviate from this draft substantially. The changes made when comparing the third to the second draft are indeed minimal.[429] The current text

plines – proposal for draft text JOB(06)193, 19 June 2006. The necessity test is included in Article 3. The development considerations apply to developing countries and not only to LDCs, see Articles 40-47.

423 Notably the EU, the US and Brazil; Delimatsis 2014, p 4; Wouters and Coppens 2008, p 222. The US position is apparent from: WTO Working Party on Domestic Regulation, Communication from the United States, Outline of the US position on a Draft Consolidated Text in the WPDR, 11 July 2006, JOB(06)/223, par 3 and 15.

424 Wouters and Coppens 2008, p 222.

425 Thus Jara and del Carmen Domínguez indicate that proposals have been submitted regarding 'all aspects of domestic regulation', that is: draft elements for Disciplines on Domestic Regulation, transparency disciplines and specific disciplines dealing with technical standards, qualification requirements and procedures and licensing requirements and procedures, A Jara and M del Carmen Domínguez 'Liberalization of Trade in Services and Trade Negotiations' (2006) 40 *Journal of World Trade*, p 117 fn 12.

426 Jara and del Carmen Domínguez 2006, p 117; WTO (WPDR) 2008a, par 3-4

427 Unfortunately, the actual number of drafts leads to confusion. WTO Working Party on Domestic Regulation, Consolidated Working Paper – Note by the Chairman, JOB(06)/225, 12 July 2006, is referred to by some as a first draft of Disciplines on Domestic Regulations, Lang 2009, p 167. Wouters and Coppens and Krajewski refer to the July 2006 document as 'a consolidated working paper', Wouters and Coppens 2008, p 222-223, Krajewski 2008, p 187. Krajewski refers to the April 2007 draft as the third draft, however, this is probably an unintentional mistake, Krajewski 2008, p 181. I will follow the Chairperson of the WPDR at that time Mr. Govindasamy who does not refer to the July 2006 document as a first draft but rather uses the terms Chairman's text or consolidated working paper. The label 'first draft' is reserved for the text circulated in April 2007. The text of 23 January 2008 is referred to as the revised Chairman's draft, which would make it the second draft. Finally, on 20 March 2009, a second revised draft was circulated by the Chairperson of the WPDR which makes that text the third draft: WTO Working Party on Domestic Regulation, Informal Note by the Chairman, Draft Disciplines on Domestic Regulation pursuant to GATS Article VI :4, second revision, informal Note by the Chairman, Room Document 2160, 20 March 2009.

428 WTO (WPDR) 2009.

429 Article 1:3 (preamble) now contains a clarifying statement that the disciplines do not prescribe or impose particular regulatory approaches in domestic regulation. The text of Article 13 (transparency) has been revised in accordance with a proposal from Switzerland: WTO Working Party on Domestic Regulation, Annotated Agenda by the Chairperson, Room Document circulated on 3 July 2008 (on file author). The language in Article 26 (fees for licensing procedures) has weakened as the revised draft stated that licensing fees are 'commensurate with the costs' which has been changed to 'are reasonable in terms of the costs'. The footnote in Article 26 now excludes fees for the use of natural resources from this provision. Article 27 (qualification requirements) was also weakened as 'where the competent authority finds it relevant' has been added to the required due consideration to be given to relevant professional experience. A similar phrase has been added to the due considera- →

seems to reflect the wishes of the less ambitious Members.[430] An informal discussion held at the 9 October meeting of the WPDR focused on an Australian proposal to reinstate the necessity test into the disciplines.[431] Moreover, a new proposal submitted by Switzerland and backed by several Members was submitted during an informal discussion in November 2009. The proposal is said to raise the level of ambition in services, incorporates views of other Members and simplifies the draft text currently under discussion.[432] As is apparent from the latest meeting reports, the impasse following the Bali Agreement led to a suspension of the WPDR negotiations as well.[433]

Implementing the future disciplines

Negotiations within the WPDR on the issue of integrating the Disciplines on Domestic Regulation in the GATS have not begun.[434] Article VI:5 refers to the 'entry into force' of future disciplines which implies implementation as a source of public international law.[435] Earlier, this issue proved problematic regarding the annex on financial services. As a result, the understanding on commitments in financial services was adopted by a select group of countries through adoption in a Member's schedule under the financial services section.[436] Incorporation in the GATS requires international consensus, as all Members need to agree on a change to the GATS framework. Moreover, this would require domestic consensus as well as a formal change needs to be ratified.[437] Krajewski notes that the required consensus makes incurporating the disciplines in the form of an annex to the GATS unlikely. According to him, a more likely alternative is therefore the approach used with the reference paper on basic telecoms, which was incorporated by several Members as an additional commitment under Article XVIII.[438] The Council for Trade in Ser-

tion to be given to Membership in a relevant professional association of another Member. Finally, Article 28 (qualification requirements) was revised so that Members no longer have to provide for the possibility that applicants can fulfil, *inter alia*, course work, examinations, training, and work experience in the home, host or any third jurisdiction. The new text merely requires that Members allow this practice.

430 WTO Working Party on Domestic Regulation, Report on the Meeting Held on 12 May 2009, 1 April 2009, S/WPDR/M/40, par 8 and 10.

431 Third World Network 'Necessity Test for Domestic Regulation of Services' Info Service on WTO and Trade Issues (2009) 21 October, available online: <http://www.twn.my> (last visited 1 October 2015).

432 The proposal is co-sponsored by Australia, Chile, Colombia, Hong Kong China, Korea and New Zealand, Third World Network 'New Domestic Regulation Proposal to Raise Ambition Level in Services?' Info Service on WTO and Trade Issues (2009) 18 November 2009, available online: <http://www.twn.my> (last visited 1 October 2015).

433 See for example the remark by the US negotiator, WTO Working Party on Domestic Regulation, Report on the Meeting Held on 17 September 2014, 28 October 2014, S/WPDR/M/62, par 3.4.

434 WTO (WPDR) 2008a, par 7; see also WTO (WPDR) 2008c, par 6.

435 Krajewski 2008, p 192; Wouters and Coppens 2008 p 225-226; see also Delimatsis 2014, p 17-18.

436 A von Bogdany and J Windsor 'Understanding on Commitments in Financial Services' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 650-652.

437 Krajewski 2008, p 192.

438 Tans 2009, par 2.5.4; Von Bogdany and Windsor 2008, p 652; H Gao 'Telecommunications Services: Reference Paper' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 724; Krajewski 2008, p 192.

vices issued a decision stating that the disciplines should be integrated in the GATS 'no later than the conclusion of the forthcoming round of services negotiations'.[439] According to Wouters and Coppens, this might indicate that implementation is postponed until they can be integrated as an annex to the GATS as part of the Doha Round overall package, which would circumvent a separate ratification procedure. Naturally, the same procedure could be used regarding Disciplines on Domestic Regulation as well. Delimatsis indicates that the disciplines can be adopted outside the singe undertaking if they are considered as subsequent agreement within the meaning of Article 31(3)(a) VCLT.[440]

It is important that Members find agreement, and in particular clarity on these issues during the current round. The current regulatory framework is incomplete and undertaking new commitments without completing the rules may be a truly bad idea. Questions can be raised as to the application of these future disciplines to commitments undertaken during (the extended negotiations of) the Uruguay Round.[441] In general, it seems unwise to extend commitments if there is still uncertainty on the intrusiveness of the domestic regulation obligation.

2.6 Enforcement of WTO law

The topic of enforcement is central in a research project addressing the impact of legal obligations. This paragraph will address the options provided to WTO Members, and the subjects of WTO rights, to enforce these rights if a WTO Member breaches its GATS obligations. Independent arbitration is essential to all systems of law. As the WTO is based on reciprocity to establish mutually beneficial trade concessions, the balance achieved should be observed. This requires a system rooted in the rule of law.[442] Trust in an objective judiciary prevents unilaterally imposed sanctions, which is essential to maintain the level of liberalization that has been achieved under the GATS. WTO Members imposing their own trade restrictions will lead to reaction which could rapidly lead to a crisis in trust between the Members. As such, a central element of the Dispute Settlement System (DSS) is ensuring security and predictability to the multilateral trading system. Despite the move from diplomatic to a rule-based form of dispute settlement, the Dispute Settlement Body should still aim at achieving a satisfactory settlement.[443] In addition to preserving rights and obligations, the DSS clarifies existing provisions of the WTO Agree-

439 WTO (CTS) 1998a.
440 Delimatsis 2014, p 19.
441 See also Tans 2009, p 51.
442 As eloquently expressed by Trebilcock, Howse and Eliason 2013, p 175 and explained in the context of the importance of trade liberalization by E Petersmann 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948' (1994) 31 CMLR, p 1157-1159.
443 Article 3:4 DSU.

ments.[444] A troublesome aspect in this regard lies in the fact that the GATS addresses domestic regulation, which will have an impact on regulatory autonomy and public policy choices that need to be made on the national and international level.[445] While WTO Members choose their level of commitment to service trade liberalization, a judicial interpretation of a GATS provision may have substantial repercussions, as can be observed from the *US - Gambling* case.[446] GATS Mode 4 concerns questions relating to, for example, labour standards. It does not take much to find a possibly controversial subject of dispute resolution. An example that plays a prominent role in this research is the issue of blanket references. Such references are incorporated in the commitments and declare that a certain legal regime applies to that commitment. The legal value of a blanket reference to labour standards, as is currently present in the EU's horizontal Mode 4 commitment, is hard to assess.[447] A commitment subject to all national and European labour standards without any substantive or time reference means that all Mode 4 commitments are subject to the legal regime as it applies. Does this indeed include changes made since the inscription of the commitment in the schedules?

2.6.1 GATS dispute settlement

Dispute settlement regarding GATS provisions and concessions is based on Articles XXII and XXIII of the GATS, and the Dispute Settlement Understanding.[448] Settlement of GATS disputes commences with diplomatic means in the form of bilateral consultations. These may be followed by multilateral consultations. Making efforts to find a diplomatic solution is obligatory as panel proceedings under the DSU are only available if consultation methods are unsuccessful.[449] A major difference in relation to the previous GATT system is that WTO dispute settlement includes appeal to the Appellate Body.[450] This is in line with the shift from a 'power', to a 'rules-oriented' approach towards dispute settlement.[451] The DSS ensures compliance with DSB rulings by providing, as *ultimum remedium* enforcement mechanisms in the form of compensation, retaliation and cross-retaliation.[452] Due

444 Article 3:2 DSU.

445 Trebilcock, Howse and Eliason 2013, p 175-176 and 179, discussing the relationship between dispute settlement and regulation of international public policy.

446 This chapter, par 2.3.5.1.

447 The problem of blanket references in commitments is introduced in chapter 1, par 1.2.3. The legality of such references is addressed in chapter 7, par 7.5.3.

448 The specialized provisions of the GATS take precedence whenever there is a conflict with provisions of the DSU, Article 1:2 DSU. The functioning of the DSU will not be discussed here. Literature is available in abundance, for instance: Trebilcock, Howse and Eliason 2013, chapter 5; Lowenfeld 2008, chapter 8.

449 Article XXII GATS; R Grote 'Article XXII GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 482.

450 Petersmann 1994, p 1215-1216.

451 Van den Bossche and Zdouc 2013, p 302; Petersmann 1994, p 1169 and 1189.

452 See for example Trebilcock, Howse and Eliason 2013, p 210-213; Grote 'Article XXIII GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds), *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus →

to the strict timeframes in which proceedings need to be completed, the procedure provides a fast solution. In practice, these timeframes are often exceeded, both by the Panel and the Appellate Body. This is both due to the increased workload and complexity of cases since the creation of the DSU. Nevertheless, there is no backlog of cases despite the frequent use of the Dispute Settlement System.[453]

2.6.2 Types of complaints

Article XXIII GATS provides access to dispute settlement in case of violation and non-violation complaints. From a GATS perspective, the violation complaint is relatively straightforward, but that is not the case for non-violation complaints. The use, or usefulness of non-violation complaints is subject to debate. As will become apparent in the national chapters, addressing the implementation of Dutch and UK GATS Mode 4 obligations, a case can be made that the implementation of each element of the commitments is not in violation of GATS obligations, but that the manner of implementation as a whole leaves little doubt that the implementation is not in line with the central concepts of the GATS. A better phrase might be that the implementation of Mode 4 commitments is in violation of the spirit of GATS. A consequential problem in this study is that it becomes hard to point to a specific violation of GATS (though these were found as well), but at the same time the outcome of this research demonstrates a gross violation of the idea of Mode 4 liberalization, or what is to be expected from such commitments. A solution to this problem might be found in the concept of non-violation complaints as that may be a useful tool to address violations of legitimate expectations arising from GATS Mode 4 commitments. This paragraph will therefore describe both types of complaints available to WTO Members.

2.6.2.1 Violation complaints

According to Article XXIII(1) GATS, violation complaints require an alleged failure of another WTO Member to carry out its obligations or specific commitments under the GATS. This includes failures through omission and covers all types of state conduct, including actions by non-state organs empowered by law.[454] Additionally, dispute settlement can be sought in relation to non-violation complaints on the basis of Article XXIII(3) GATS but such claims require demonstration of nullification

Nijhoff Publishers, Leiden 2008), p 502-504. The US - Gambling case forms a prime example of cross-retaliation as the arbitrator allowed Antigua to withdraw TRIPS concessions as a response to the violation of GATS obligations by the US, Trebilcock, Howse and Eliason 2013, p 211.

453 H Nordstrom and G Shaffer 2007 'Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure: A Preliminary Analysis' Issue Paper 2 (ICTSD, Geneva 2007), p v; Van den Bossche and Zdouc 2013, p 179 and 246-250.

454 Grote 2008b, p 493-494.

or impairment of a benefit provided under the GATS in order to be admissible.[455] The terms violation and non-violation complaints and nullification or impairment are traditional GATT terms.[456] In Article XXIII of the GATT, the term nullification and impairment is still included. However, under the GATT 1947 a violation of GATT obligations in practice meant that the condition nullification or impairment was fulfilled, and Members confronted with a breach were never able to rebut a charge of nullification and impairment in relation to a breach of GATT rules. The condition was not incorporated in Article XXIII(1) of the GATS and therefore it does not form a condition for a violation complaint, as is the case with Article XXIII(3) GATS.[457]

2.6.2.2 Non-violation complaints

Non-violation complaints were introduced in the GATT 1947 to prevent the distortion of improved competitive opportunities by measures that are consistent with the Agreement. Due to the nature of trade liberalization on the basis of reciprocity, the non-violation complaint serves to protect reasonable expectations based on the outcome of negotiations.[458] The inclusion of this type of complaint in the GATS can be viewed in this light, the protection of conditions of competition that prevailed at the time of the inscription of the commitments.[459] As argued by Petersmann, non-violation complaints under the GATS may relate to nullification and impairment of rights and obligations provided in the schedules through indirect circumvention.[460] As of yet, there is no case law based on GATS non-violation complaints.[461]

Consequently, reflections on the conditions for a non-violation complaint must be based on GATT case law, which recognizes three main conditions for such a claim.[462] There must be a measure in dispute,[463] there must be a benefit in the form of improved competitive opportunities and this benefit must be nullified or impaired as a causal consequence of the measure, which goes beyond a *de minimis* contribution.[464] Nullification and impairment require that the competitive position of the imported products is being upset as the result of the application of a meas-

455 Article XXIII:1 and 3 GATS; Grote 2008b, p 490-491. The actual rules on dispute settlement can be found in the DSU, which forms an annex to the WTO Agreement.
456 F Spitzer *The Non-Violation Complaint in WTO Law* (Tenea ,Berlin 2004) p 75; Petersmann 1994, p 1230.
457 Grote 2008b, p 494.
458 Al-Kashif 2008, p 514.
459 Grote 2008b, p 498; Petersmann 1994, p 1231.
460 Petersmann 1994, p 1231.
461 The three GATS cases, *Mexico – Telecom, US Gambling* and *China – Audiovisuals*, are not based on an Article XXIII(3) GATS complaint.
462 Similar: Al-Kashif 2008, p 511-512 and 519.
463 This chapter, par 2.3.5.
464 Grote 2008b, p 500, referring in analogy to *Japan – Film*, WT/DS44/R, par 10.84

ure which could reasonably not have been anticipated.[465] As indicated, in relation to the GATS, the benefit relates to the commitments undertaken under Article XVI, XVII or XVIII GATS. Such a benefit exists if the benefit was reasonably to be expected when the commitment was made.[466] It is argued that the concept of non-violation complaints and the protection of reasonable expectations relating to GATS commitments lead to difficulties in comparison with this concept, as introduced in the GATT 1947. Reciprocity under the GATT concerned binding tariff concessions as agreed between two Members at the time of the concession. Service commitments are offered as a package by each Member on the basis of progressive liberalization. As such, it is harder to identify reasonable expectations in relation to a Member's GATS commitments.[467] Additionally, it is argued that the scope of application of non-violation complaints is greatly reduced as GATS obligations limit the autonomy of Members to adopt regulatory policies contrary to inscribed commitments. Adopting a commitment entails a binding promise not to adopt subsequent legislation in contrast with the commitment. As such, these situations would lead to a violation complaint.[468] Criticism directed towards the concept itself is addressed at uncertainty and generality of the non-violation language.[469] Finally, GATS commitments are more complex as services and service providers are often subject to various domestic regulations. This in itself makes it difficult to identify reasonable expectations provided by a Member in its specific commitments.[470] Besides these arguments, to date only seven disputes on the basis of a non-violation complaint were filed. Additionally, the Appellate Body indicated that non-violation remedies 'should be approached with caution and should remain an exceptional remedy'.[471]

Nevertheless, with Grote I agree that these arguments leave sufficient room for scenarios in which a GATS non-violation complaint is possible. More importantly, it is suggested here that the concept may perform an important function. Without

465 Van den Bossche and Zdouc 2013, p 174 referring to *Japan – Film*, WT/DS44/R, par 10.82.

466 Grote 2008b, p 499, referring in analogy to *Japan – Film*, WT/DS44/R, par 10.61. See for an extensive description of these three conditions: Al-Kashif 2008, p 519-554.

467 Grote 2008b, p 500-501; Spitzer 2004, p 74; S Cho 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' *Harvard International Law Journal* (1998) 39, p 325; Petersmann 1994, p 1230-1231; PJ Kuyper 'The Law of GATT as a Special Field of International Law: Ignorance, Further Refinement, or Self-Contained System of International Law?' *Netherlands Year Book of International Law* (1994) XXV, p 247-249.

468 Grote 2008b, p 500; E Petersmann *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (Kluwer Law International London 1997), p 148-149. Note that Cho seems to draw a different conclusion by emphasizing the right of GATS Members to regulate. As such, Cho concludes that non-violation complaints are thus hard to adopt for a panel, as 'introducing a new regulation is at least facially consistent with GATS'. To me it seems that new legislation will, if it breaches a commitment, lead to a violation complaint. The example provided by Cho, introducing more restrictive legislation for a foreign bank, is exactly what progressive liberalization tries to prevent, Cho 1994, p 325-326.

469 Al-Kashif 2008, p 516; Kuijper 1995, p 248.

470 Grote 2008b, p 500; Cho 1998, p 325-326; Petersmann 1994, p 1231.

471 Van den Bossche and Zdouc 2013, p 175; *European Communities – Measures Affecting Asbestos and Asbestos Containing Products (EC – Asbestos)* WT/DS135/AB/R, 5 April 2001, par 186.

such room, Article XXIII(3) would be left without any meaning, which clearly goes against the will of the parties when drafting and agreeing on the GATS. The provision was included to protect specific obligations and commitments, as the GATS framework would not 'be sufficiently comprehensive to cover all types of government acts and policies affecting trade in services'.[472] As noted by Kuijper, it is indeed up to the panels and Appellate Body to apply judicial restraint in relation to non-violation claims.[473] Under GATS the concept was introduced in relation to, and should be limited to, the protection of specifically adopted commitments. The GATS is based on a balance between the right to regulate and the aim of progressive liberalization. Coupled with the complex reality of the interaction between specific commitments and domestic service regulations, it is more than feasible that regulations do not specifically violate GATS obligations, yet undermine or circumvent commitments.[474] As will be demonstrated when discussing the implementation of GATS Mode 4 obligations in the Netherlands and the UK, non-violation complaints might already serve a purpose in relation to the general manner in which these commitments are implemented.[475] Nothing prevents an interpretation of commitments in relation to their purpose, providing market access and national treatment. There is therefore no need to interpret a commitment in relation to the expectation of another WTO Member.[476]

2.6.3 Access to dispute settlement

Access to the DSS is limited to the contracting parties of the WTO Agreement. Individuals or international organizations cannot have recourse to WTO dispute settlement.[477] Consequently, interested private parties (both domestic service suppliers confronted with possible competition, and foreign service suppliers confronted with infringements of GATS Mode 4 obligations) will have to persuade their government to protect their interests.[478] They do have the option, in the form of *amicus curiae* briefs, to submit their views directly to panels and the Appellate Body.[479] This does not mean that private parties are not involved. According to Van den Bossche and Zdouc it is hard to identify cases where companies and industry were

472 Al-Kashif 2008, p 517-518;
473 PJ Kuijper 'The New WTO Dispute Settlement System: The Impact on the European Community' (1995) 29 *Journal of World Trade*, p 249.
474 Grote 2008b, p 501.
475 Chapter 7, par 7.5.3.
476 Grote 2008b, p 501; Spitzer states that panels would find it extremely difficult to find a non-violation complaint, Spitzer 2004, p 77; see also Kuijper who rejects the notion altogether, Kuijper 1995, p 247-249.
477 Van den Bossche and Zdouc 2013, p 172; *United States Import Prohibition of Certain Shrimp and Shrimp Products (US - Shrimp)* WT/DS58/AB/R, 12 October 1998, par 101. See also, Grote 2008b, p 492.
478 Grote 2008b, p 492.
479 Trebilcock, Howse and Eliason 2013, p 189-190; Grote 2008b, p 492; specifically recognized in *US – Shrimp* Appellate Body Report, par 110; see also, regarding the possibility, *EC – Asbestos* Appellate Body Report, par 55-56.

not the driving force behind the initiation of proceedings.[480] Under EU law, the Trade Barriers Regulation[481] provides the possibility to private parties to bring violations of WTO obligations by other WTO Members under the attention of the Union (in practice the Commission), which may, depending on the case, initiate formal international consultation or dispute settlement procedures.[482]

In relation to Mode 4, bringing violations in relation to commitments under the attention of Member States will most likely be up to service sector based organizations. It is difficult to conceive individual service suppliers lobbying their government. However, a national accounting association or an organization of multinational representatives could be effective in bringing such violations to the forefront. This may lead to interesting results in relation to Mode 4. 'Normally', representatives of a specific service sector would lobby their own government to initiate proceedings against other WTO Members hindering access to that Member's market. However, in the case of multinational companies it is just as likely the home state of that company which hinders access to personnel (for instance intra-company transfers) based in another WTO Member State.[483] This matter falls outside the scope of the EU Trade Barriers Regulation which defines 'obstacles to trade' as 'trade practice adopted or maintained by a third country'.[484] As such, this would require a lobby directed at another WTO Member to instigate consultations or dispute settlement on behalf of individual Mode 4 service suppliers based in that Member State and the company based in the (EU) host state interested in that individual.

2.7 Analysis and conclusions

Regulating international trade serves several global interests. Studying the history of the General Agreement on Tariffs and Trade demonstrates that trade liberalization addresses one of the main constituting factors of international conflict, protectionism and deterioration of trade relations. Intended to prevent conflict, the method of addressing protectionism serves the additional purpose of economic growth. A connection between trade and development can be drawn as well. The

480 Van den Bossche and Zdouc 2013, p 178.

481 Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particularly those established under the auspices of the World Trade Organization OJ (1994) L348/71.

482 Council Regulation (EC) No 3286/94 (Trade Barrier Regulation), Article 5 and 13. Similar instruments are adopted by other WTO Members, such as the US and China, but even without formal means, lobbying by private parties is common, Van den Bossche and Zdouc 2013, p 178.

483 As an example, representatives of 25 multinational companies established in the Netherlands meet in the form of a contact group. This group discusses *inter alia* legal issues in relation to aliens. Such groups may effectively lobby governments in relation to Mode 4 commitments, interview CapGemini NL (3-12-2010).

484 Council Regulation (EC) No 3286/94 (Trade Barrier Regulation), Article 2(1).

transition from the GATT framework to the WTO allowed the new international organization to address the increasingly problematic issue of non-tariff barriers. These barriers proved hard to overcome due to the constitutional defects of the GATT. At the time of this transition, international trade had changed since the post-Second World War period. At the end of the 1980s, increase of importance of the services industry and technological change had led to the perception that international trade in services was a feasible option for inclusion in the WTO framework. Additionally, a trade liberalization regime that seeks to effectively address non-tariff barriers is also suitable to liberalize trade in services. As services provision is often heavily regulated, the applicable legal framework needs to not only address tariff measures, but also behind the border measures. Initially, the wish to include services within the multilateral trade framework was expressed by developed countries, in particular the US, driven by the lobby of their service industries. During the Uruguay Round negotiations discussion emerged on the inclusion of capital movements (Mode 3), favoured by developed countries, and the movement of natural persons (Mode 4), favoured by developing countries. In the end, both forms of service provisions were specifically included within the result of the services negotiations, the General Agreement on Trade in Services. Another important addition to the multilateral trade liberalization framework was the attachment of the Dispute Settlement Understanding to the WTO Agreement. The DSU clearly signifies a transition from a more consensus-based dispute settlement system to a more rules-based system. Such changes should have a positive outcome in compliance, which is vital to transparent trade conditions. This is also important as WTO obligations, including the GATS, constitute an increase in the intrusion on the regulatory autonomy of WTO Members. This increase is the result of disciplines addressing non-tariff barriers in relation to goods and services.

The GATS approach to liberalization of trade in services is to address the barriers that hinder such trade. The GATS is directed at measures of WTO Members which affect trade in services. With the inclusion of all forms of service trade, the potential reach of the GATS is very broad. The fact that GATS concerns service provision does entail a limitation in time, and employment liberalization is specifically excluded from its scope. The GATS covers almost all governmental measures in nearly every service sector with only air traffic rights and a few governmental services being excluded. However, the application of several central GATS concepts, including market access and national treatment, only apply insofar as WTO Members have explicitly committed themselves in their schedules of commitments. The domestic regulation provision only applies to sectors where specific commitments were adopted. The consequence is that the scope of the GATS is in part determined by these lists. Therefore, in theory the reach of the GATS is as wide as Members are willing to commit themselves to. In practice, liberalizing trade in service should be achieved progressively in the form of successive trade

negotiation rounds. A WTO negotiation round aims at a massive package deal where all WTO Members exchange requests and offers on the basis of reciprocity in relation to all trade topics simultaneously. Only if all Members agree on the outcome is the round concluded. That this process is complicated is evident from the first WTO negotiation round, the Doha Round, which commenced in 2001 and is still ongoing in 2015. As such, the GATS liberalization commitments are still limited to the agreed concessions made during the Uruguay Round. For Mode 4 the results of that round are rather limited. It is clear that GATS Mode 4 liberalization does not reflect the balance struck during the Uruguay Round, the inclusion of Mode 4 as a trade-off for the inclusion of capital movement. Worse, GATS Mode 4 commitments mostly relate to commercial presence and only include services or categories of providers connected to the highly skilled. This does not reflect Mode 4 commitments which are most interesting for developing WTO Members.

Liberalization commitments can be adopted as market access commitments, national treatment commitments and additional commitments. Such commitments will relate specifically to one of the four modes of supply. Committing to market access in a certain service sector means that the measures listed in that provision may no longer be applied. Immigration and labour market policy measures that are included in this list include quota relating to work permits and economic needs tests. In addition, the national treatment obligation ensures equal treatment with domestic service providers once a service provider has access to the service market of another WTO Member. Foreign service self-employed service providers or foreign service suppliers posting their employees, either as ICTs or as posted workers, should be able to operate on a competitive level playing field with domestic service suppliers. The domestic regulation obligation relates to the administration and the regulatory regime applicable to a service. This obligation thus applies to measures beyond the obstruction of discriminatory market access measures and other discriminatory measures, targeting unnecessary non-discriminatory regulatory measures. Besides transparency obligations for the administration and procedures concerning service trade, the effects of this provision may be enhanced to the obligation to remove non-necessary obstructions to trade in the form of qualification requirements and procedures, technical standards and licensing requirements. Additionally, Members must take 'reasonable measures' to ensure that all regulatory entities observe obligations and commitments under the Agreement. However, the domestic regulation rules are still incomplete. This obligation's encroachment on regulatory autonomy, and the discussion surrounding it, proved too great to overcome during the Uruguay Round. In the meantime, a provisional set of rules applies, the effectiveness of which may be questionable if existing legislation is considered 'reasonably expected'. Moreover, the provisional application sets a standard for qualifications, licences and technical standards not to nullify and impair existing commitments, a threshold which is lower than a ne-

cessity test. The exact effect of this obligation depends on the outcome of the negotiations on Disciplines on Domestic Regulation. In relation to all GATS obligations, Member States can rely on various exemptions. Of these exemptions the public moral ground may prove relevant to exempt certain immigration and labour market rules from the obligations of the GATS. Moreover, the Annex MNP specifically provides that Members may continue to regulate entry and stay of natural persons. Such measures however, may not nullify or impair benefits derived from the GATS. The interaction between obligations, commitments and exceptions will therefore form the parameters of the scrutiny of Dutch and UK immigration and labour market rules included in this research.

The progressive liberalization mechanism of the GATS is the combination of the provisions that apply to specific commitments and the commitments undertaken during negotiation rounds. The combination of the provisions on market access, national treatment and domestic regulation ensure access, a level playing field and the abolition of unnecessary non-discriminatory measures. An additional important element of the GATS is formed by the general obligation of transparency. Transparency constitutes a vital element for economic activities, in particular for services due to the density of regulation. In relation to Mode 4, national immigration and labour market policies can be severely complex. The result is that transparency may be seen as one of the cornerstones of the GATS. Finally, transparency serves the purpose of illuminating the existing barriers to trade, which is useful for the negotiation process.

The Bali Agreement forms a long awaited sign of progress and could be seen as a way out of the deadlock reached in the Doha Round negotiations. At the same time, the Bali Agreement does not solve the central negotiation issues. The fate of the Disciplines on Domestic Regulations seems bound to the outcome of the Doha Round in general. Studying the Doha Round revised offers reveals that trade liberalization offered in GATS Mode 4 is quite modest. Considering the importance of service trade liberalization, the limited liberalization provided in the Uruguay Round and offered in the Doha Round underlines the central question posed in this research, why do states agree to liberalize Mode 4, and why are they reluctant to deliver? This question will be addressed after studying the second international legal order addressing trade in service liberalization, the European Union. As the EU is very successful in this aim compared to the WTO, a comparison should be revealing.

The success of a legal regime to ensure observance by Members with its obligations is to a great extent dependant on its enforcement mechanism. Dispute settlement and the enforcement of WTO obligations in cases of a breach of commitments is available to WTO Member States only. This means that service providers benefiting from commitments only have indirect access to dispute settlement through lobbying WTO Member's governments. In relation to Mode 4, this leads

to odd results which in turn relates to GATS Mode 4 commitments mostly addressing the highly skilled. As such, liberalizing the intra-company transfer category actually benefits companies of the WTO Member providing the commitment, as they are the interested party in relation to such Mode 4 movements. This all the more reflects the failure to include a fair balance between the interests of developing and developed countries at the time the current Mode 4 commitments were inscribed.

Chapter 3

EU law and the freedom of movement of service providers

3.1 Introduction

This chapter forms the counterpart of the previous chapter. Following the same logic, to fully understand the motivation of the two investigated states, the Netherlands and the United Kingdom to accept binding commitments involving movement of natural persons (or service mobility), it is necessary to understand the aim of the European Union. As the World Trade Organization and the EU share a common ancestry, the motivation to liberalize regional trade in Europe is similar to the overview provided in the previous chapter.[1] However, the European integration project is more than the creation of an internal market where barriers to cross-border service trade are to be removed. The development of the EU and the development of regional trade liberalization in Europe clearly differ from the route that has led to the creation of the WTO and the General Agreement on Trade in Services. The consequence is that the central question posed in this research can be investigated from different angles. The second purpose of this chapter is to describe the scope of the EU freedom of movement of service providers and the relevant EU law obligations placed on EU Member States. Coupled with provided ex-

1 Chapter 2, par 2.2.

emptions to such obligations (or in EU parlance justifications) and the EU's enforcement mechanism, this description enables an assessment of the influence of EU law on the regulatory autonomy of the Netherlands and the UK in relation to immigration and labour market policies. The chapter will conclude with a summary of the here described topics.

3.2 European economic integration

In parallel with the developments relating to multilateral cooperation, the origins of the regional integration project that has become the European Union can be traced to the great wars in the twentieth century, and the idea to replace international economic competition with cooperation.[2] The idea of a united Europe was submitted in proposals by various authors since the seventeenth century. The First World War gave a strong push towards thinking on European union as a means towards ending the constant cycles of war that have plagued the continent. Yet it was the Second World War that finally convinced governments of the need to create a united Europe.[3] Besides the idea of European integration to address the nationalist rivalries which had culminated into war, economic recovery in itself formed an important objective towards integration. In general, the dominant belief in the first years after World War II were that rebuilding the European economies would require both external assistance from the United States and cooperation amongst the European states.[4] Another important factor was the rise of tension between the East and the West which led to involvement of the US into western European affairs. The bipolarisation, culminating into the Cold War, contributed towards integration of Western Europe as well, as a need to form a collective against the Union of Soviet Socialist Republics was felt.[5] In May 1948 the Congress of Europe was organized, a gathering of those that were in favour of integration or even a federal organization. The aim of the conference was to discuss the blueprint of a European union or federation, complete with its own institutions, a charter of hu-

2 Chalmers, Davies and Monti provide a short description of both the development of the idea of Europe from ancient Greece to now, and the idea of European Union in the form of proposals for a united Europe, D Chalmers, G Davies and G Monti *European Union Law* (Cambridge University Press Cambridge 2014), p 4-8; an early example in both handbooks of these proposal is that of William Penn in 1693 in his 'An Essay Towards the Present and Future Peace of Europe' urging for a European Parliament and changes to the division of Europe into states, P Craig and G de Búrca *EU Law. Text, Cases and Materials* (Oxford University Press, Oxford 2015), p 2; for a specific overview of the opening moves towards the current EU, see: DW Urwin 'The European Community: From 1945 to 1985' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007) , p 13-29.

3 Chalmers, Davies and Monti 2014, p 8; N Foster *Foster on EU Law* (Oxford University Press, Oxford 2013), p 4, see extensively: chapter 3.2.

4 External assistance was provided with the Marshall Plan. The insistence of the USA to distribute the Marshall Plan aid through cooperating in the Organisation for European Economic Cooperation (OEEC) provided an incentive for the (western) European states to work together, Urwin 2007, p 17-18.

5 Urwin 2007, p 15.

man rights, a European court, a common market and a monetary union. As participating states, including the UK, could not yet accept a project that would interfere with their state sovereignty, the resulting Council of Europe therefore led to cooperation rather than integration.[6] On a different track, the Schuman Plan proposed the idea to pool the coal and steel supplies of the traditional rivals France and Germany. The invitation to join that plan was picked up by the Benelux nations (Belgium, the Netherlands and Luxembourg) and Italy, which led to the creation of the European Coal and Steel Community (ECSC).[7] The original plan already had a wider framework at its heart, the achievement of political union through economic integration.[8] As such, the creation of a common or internal market forms the centre of the European integration project.[9] The Treaty establishing the European Economic Community indicated that the EEC has economic growth, stability and closer relations between the Member States as its task, to be reached by establishing a common market and the progressively approximating of the economic policies.[10] In 2015, the Treaty on European Union (TEU) provides that '[t]he Union shall establish an internal market'.[11] This internal market is central to this chapter, as freedom of movement of service providers is one of the four fundamental freedoms ensured by it.

A customs union ensures free movement of goods by the abolition of customs duties and quantitative restrictions, as well as measures having equivalent effect. This is flanked by a common customs tariff and commercial policy towards third countries in order to prevent differences in tariffs. The EU aims at a much deeper level of economic integration as it seeks not only free movement of products but also 'the abolition, as between Member States, of obstacles to the free movement of, persons, services and capital'.[12] Within a common market the factors of production can move freely within its borders. The free movement of goods and workers and the freedom of establishment and to provide services are referred to as the four freedoms.[13] The four freedoms are formulated as non-discrimination provisions. These provisions ensure the right to pursue economic activities in another

6 Craig and de Búrca 2015, p 3; Urwin 2007, p 17; I Bache and S George *Politics in the European Union* (Oxford University Press, Oxford 2006), p 84; the UK, together with France, was thought to be of key importance in the opening moves towards European integration due to its role in World War II, Urwin 2007, p 15-16. The Council of Europe is responsible for the European Convention for the protection of Human Rights and fundamental freedoms (ECHR) and the European Social Charter. The relevance of these instruments for this work is discussed at chapter 1, par 1.2.3.

7 Bache and George 2006, p 95.

8 Bache and George 2006, p 95-96.

9 The terminology shift from common to single or internal market, legislatively introduced with the Single European Act (SEA), has little relevance, C Barnard *The Substantive Law of the EU, the Four Freedoms* (Oxford University Press, Oxford 2013), p 11-12.

10 Article 2 EEC.

11 Article 3(3) TEU.

12 Article 3(1)c EEC.

13 Articles 34, 35 (goods), 45 (workers), 49 (establishment), 56, 57 (services) and 63 (capital) Treaty on the Functioning of the European Union (TFEU).

Member State 'under the same conditions as are imposed by that State on its own nationals'.[14] Provisions on fair competition ensure that private entities do not frustrate the level playing field public entities are required to ensure.[15] As is apparent from blueprint reports on which approval of the EEC Treaty was based, the theory was that freedom of movement for the factors of production would lead to a better allocation of the European work force and equalization in the price of labour. This would increase productivity and the level of prosperity for all would rise.[16] This economic theory was also apparent from article 117 EEC concerning social policy:

> Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.[17]

The underlying rationale of ensuring peace through economic growth is apparent from the adopted method, preventing protectionism through the liberalization of international trade. The EU aims at the creation of an internal market where the factors of production can freely cross borders without distortion of competition. The ultimate aim is to reduce barriers to trade in order to reach a level playing field on a Member States market for national and international competitors.[18]

3.2.1 Creating an internal market for services, the EEC

The EEC contained free movement of service providers from its inception. The ambition of an internal market was to be achieved over a transitional period of twelve years, divided into three stages.[19] Reflecting its importance in international trade in the 1950s, free movement of goods was drafted in much more detail in the

14 See for an example relevant to the topic at hand: case C-113/89 *Rush Portuguesa Lda mot. Office national d'immigration* ECLI:EU:C:1990:142, par 11.

15 Articles 101-103 TFEU; see for instance: A Jones and B Sufrin *EU Competition Law Text, Cases & Materials* (Oxford University Press, Oxford 2010).

16 Verschueren indicates in particular the Ohlin and Spaak reports as examples of presenting this background theory, H Verschueren 'De Europese Interne Markt en het Sociaalrechtelijk Statuut van Grensoverschrijdende Werknemers: een Trojaans Paard voor het Sociaal Recht van de Lidstaten?' in J Meeusen and G Straetmans (eds) *Bedreigt de Europese Interne Markt de Sociale Welvaartsstaat?* (Intersentia, Antwerpen 2007), p 66-67; Barnard 2013, p 9; C Barnard EU *Employment Law* (Oxford University Press, Oxford 2012), p 5; O de Schutter 'Transborder Services and Social Dumping' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press Cambridge 2012), p 349.

17 Article 117 EEC, now Article 151 TFEU.

18 Articles 3 TEU and 26 TFEU.

19 Article 8 EEC.

EEC Treaty than the provisions concerning workers, establishment and services. The internal market was partly realized in the 1960s in relation to trade in goods when custom tariffs and quantitative restrictions were abolished between the Member States.[20] Initially, the substantive provisions providing the right to free movement were limited to nationals of the Member States who were economically active, either as a worker, or as a self-employed person. The free movement of natural persons is a far more sensitive issue than the free movement of goods. Fears over security and welfare led to the required connection between mobility and economic activity. Moreover, while free movement of goods was flanked by a Common Commercial Policy, this was not the case regarding the free movement of persons. Fearing the pressure generated by an open border policy on national job markets and welfare systems, governments of the Member States refused to allow individuals holding the nationality of a non-member state to benefit from the rights of free movement.[21] In contrast with national reluctance, the original intent of the EEC Treaty was to allow employers to import labour when required. The initial idea was economic in nature and is described as embedded liberalism. This term entails that liberalizing a market is the task of the international or supranational legal order. This free market is embedded in a social policy and in social law that belongs to the exclusive competence of the national legal order.[22]

In reality few people decided to utilize their mobility rights due to a range of discouraging factors. Barnard indicates that social (the wish not to move without family), economic (fear of losing entitlements to social benefits, especially pensions), cultural (familiarity and enjoyment of the way of life in the home state), and linguistic (the lack of necessary language skills) factors led to very few people moving in the early days of the EEC.[23] Foster notes that, with the exception of Italians moving to Germany, large scale movement of workers in the original Member States did not occur.[24] Despite the legal entry into force of the free movement of workers by 1968, less than 2% of the work force decided to utilize these rights.[25] Employers and the Commission realized early on that it is easier and cheaper to move capital towards areas where labour is cheaper rather than rely on large scale movement of persons.[26] The original intent of the EEC, freedom of movement of persons, over time was broadened from an instrument of encouraging economic progress, towards rights granted to individuals. Evans provides the examples of

20 MS Houwerzijl *De Detacheringsrichtlijn, Over de Achtergrond, Inhoud en Implementatie van Richtlijn 96/71/EG* (Kluwer, Deventer 2005), p 30.
21 Barnard 2013, p 231.
22 S Guibboni *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective* (Cambridge University Press Cambridge 2006), p 29.
23 Barnard 2013, p 230.
24 Foster 2013, p 278.
25 Houwerzijl 2005, p 2.
26 Foster 2013, p 277.

service receivers and job seekers.[27] Legislation was adopted to overcome obstacles to the free movement of persons. In parallel, effectuating the specific right of free movement for service providers proved difficult as well. A particular feature of the services trade sector is that it is subject to various measures regulating professions. National rules, regulations and conditions of professional organizations and bodies influence the basic free movement rights for the self-employed. The Commission initially adopted general legislative programmes for the abolition of these restrictions on freedom of establishment as well as for services.[28] As noted by Foster, some 40 sectoral directives illustrate the various harmonization attempts to eliminate barriers derived from differences in legislation regulating professions. These attempts usually led to lengthy negotiations. The Architects Directive, which took 18 years of negotiations, is a clear example of this slow process.[29]

Besides difficulties in realizing the freedom of movement for service providers, the progress towards integration in general was stalled. During the 1960s the 'empty chair crisis' emerged which mostly related to reluctance to subside national sovereignty to the European institutions.[30] A solution was found in the form of the right for every Member State to veto decisions in cases of disagreement (the Luxembourg compromise), a practical situation that lasted until 1986 when the Single European Act was signed.[31] During the 1970s the faltering of the integration project intensified, not least due to adverse economic conditions, which are exemplified by the two oil crises.[32] The opening moves of European integration demonstrate the reluctance demonstrated by the Member States to accept loss of sovereignty in general, and in relation to movement rights for natural persons in specific. Soon after the Second World War, the devastations of which constituted an unparalleled push to overcome this reluctance, the integration process ground to a halt.

3.2.2 The Single European Act

Renewed interest in the integration process was both influenced by the stagnation in integration during the 1970s and by the economic situation in the beginning of the 1980s. The slow progress led to a series of reports urging initiatives towards

27 AC Evans 'European Citizenship' (1982) 45 *Modern Law Review*, p 499-505, in particular p 504-505.
28 Council of the European Communities, General Programme for the abolition of restrictions on freedom of establishment 18 December 1961 OJ (1962) No 2/36; Council of the European Communities, General Programme for the abolition of restrictions on freedom of services 18 December 1961 OJ (1962) No 2/32.
29 Foster 2013, p 298.
30 Urwin 2007, p 24; Craig and de Búrca 2015, p 6-7.
31 Urwin 2007, p 24; Craig and de Búrca 2015, p 6.
32 Bache and George 2006, p 144-145.

institutional reform and a return to supranationalism.[33] The Fontainebleau European Council summit of 1984 led to two committees to look at Treaty revision and further political integration. The Adonnino Committee had as its task to study ways to promote European identity and the Dooge Committee was charged with studying political reform. While the Dooge Report, recommending strong institutional reform action, was ignored, the inactivity finally came to an end in the 1980s.[34] A greatly contributing factor can be found in the global economy. Japan had emerged as an economic force in the world economy. Regarding the world recession caused by the second oil crisis in 1978, the US was doing better than the European states.[35] That states are willing to accept loss of sovereignty on the basis of economic expectations is also evident from the accession of the UK to the EEC. In comparison, the EEC countries were economically performing better and expectancies of economic gains contributed to the wish to participate to European integration.[36] At the same time, the UK initiative to join integration can be negatively formulated as well. Confronted with an economic integration project that proved successful, joining would be beneficial to the UKs economic development. However, this included unwanted political cooperation.[37] Additionally, the European lobby groups had begun to organize themselves and from the 1980s industrialists stated their wishes for the completion of the common market to increase its competitiveness.[38] A parallel can be drawn here with the subject of the previous chapter, as such lobby groups (in particularly service industries in the US) placed the topic of international trade in services on the WTO agenda at the same time.[39]

During the 1980s it became apparent that the vertical approach to harmonization, trying to create common rules applying to specific economic sectors, was not working. This regulatory approach changed during the 1980s. Instead of trying to create common rules on a sector by sector basis, a horizontal regulatory approach was adopted. A horizontal approach entails the adoption of directives which set out general principles applying throughout entire industries. General principles are

33 In 1972 the Vedel Report, in 1974 the Tindemans report, in 1978 the Three Wise Men report and in 1979 the Spierenburg report, Craig and de Búrca 2015, p 7-8; Foster 2013, p 28; Urwin 2007, p 26. See for a summary of the Tindemans and the Three Wise Men reports: *Bulletin of the European Communities* 11-1979, par 1.5.2.

34 Craig and de Búrca 2015, p 7-8; Foster 2013, p 28.

35 Chalmers, Davies and Monti 2014, p 21; Foster 2013, p 27.

36 JK de Vree and M Jansen *The Ordeal of Unity. Integration and Disintegration in Modern Europe* (Amsterdam University Press, Amsterdam 1998), p 263.

37 C Twitchett and KJ Twitchett 'The EEC as a Framework for Diplomacy' in C Twitchett and KJ Twitchett (eds) *Building Europe. Britain's Partners in the E.E.C.* (Europa Publications, London 1981), p 27; accession of the UK was rejected twice by the French, in 1963 and 1967. After the French presidency changed in 1969 the French attitude changed. Ultimately the UK joined the European integration project in the first enlargement round of 1973.

38 Chalmers, Davies and Monti 2014, p 21; Bache and George 2006, p 154; examples of these industrial lobby groups are the European Round Table and the Union of Industrial and Employers' Confederations of Europe (UNICE) which changed its name to Business Europe in 2007: <www.businesseurope.eu> (last visited 1 October 2015).

39 Chapter 2, par 2.2.4.

less detailed and therefore leave room for interpretation.[40] These general rules were moreover based on minimum harmonization leading to a stronger reliance on mutual recognition.[41] This concept formed the heart of the Commission's White Paper on completing the internal market, which introduced a 1992 deadline to complete the removal of the identified barriers to the internal market.[42] Adding momentum to the initiative to complete the internal market, the Commission published economic studies such as the Cecchini report[43] which tried to convince the Member States governments, firms and citizens of the benefits of a shared market by focusing on the costs of existing barriers to trade.[44]

Reforms were implemented through a revision of the EEC, referred to as the Single European Act (SEA). The SEA was signed in 1986, though not without reluctance from the Member States,[45] and entered into force in May 1987.[46] The SEA can roughly be said to include two reform packages, the first half of which incorporates 279 proposals included in the Commission's White Paper.[47] These proposals aim at 'an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured'.[48] The second part of the SEA addressed the legislative stagnation caused by the Luxembourg compromise veto option. The SEA extended the qualified majority voting procedure to matters relevant for completing the internal market.[49] The drive to establish an area without internal frontiers led to a push to create stronger control at the external borders. Consequently, it became necessary to develop a common policy on immigration, dealing with visas, asylum and the status of refugees. Differences in immigration policies between Member States with external borders would risk the attraction of migration flows. Due to the abolition of internal borders, migrants could then travel to any of the other Member States.[50] This topic was earlier placed on the agenda in 1972 by the Tindemans report which considered the need to remove border con-

40 Barnard 2013, p 666.

41 A Moravcsik 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45:1 *International Organization*, p 20.

42 European Commission White Paper 'Completing the Internal Market' COM (1985) 310 final, 14 June 1985, p 19-20.

43 P Cecchini M Catinat and A Jacquemin *The European Challenge 1992 – The Benefits of a Single Market* (Wildwood House, Aldershot 1988), in particular chapter 6 concerning service sectors.

44 B de Witte 'Setting the Scene: How did Services get to Bolkestein and Why?' (2007) 20 European University Institute Working Papers, available online at: <http://cadmus.eui.eu/bitstream/handle/1814/6929/LAW_2007_20.pdf?sequence=1> (last visited 1 October 2015), p 2; Craig and de Búrca 2015, p 611.

45 Craig and de Búrca 2015, p 614; Chalmers, Davies and Monti 2014, p 21-22.

46 European Commission, *Completing the Internal Market*, White Paper from the Commission to the European Council, COM (85) 310 final. See for an overview of the steps leading towards the Single European Act: Craig and de Búrca 2015, p 609-614; Chalmers, Davies and Monti 2014, p 21; Foster 2013, p 27.

47 Moravcsik 1991, p 19.

48 European Commission 1985, par 4; Moravcsik 1991, p 19-20.

49 Moravcsik 1991, p 20.

50 M Condinanzi, A Lang and B Nascimbene *Citizenship of the Union and Freedom of Movement of Persons* (Martinus Nijhoff Publishers, Leiden 2008), p 205-206.

trols as a means to 'make the [Union] "more real" to its citizens'.[51] The Commission recognized that removal of the internal borders would lead to free movement of persons for third-country nationals as well. To address this, the Commission indicated that it would propose legislation concerning coordination of rules on residence, entry and access to employment with regard to such nationals. Moreover, the Commission expressed the need for a policy on visas.[52] However, the governments of the Member States were reluctant to transfer their sovereignty on this topic.[53] Instead of leaving the initiative with the Commission, five of the, by that time, ten Member States chose to pursue the abolition of the internal borders through intergovernmental cooperation in the form of the Schengen Agreement.[54]

3.2.3 From economic activity to mobility for citizens

Initially, movement and residence rights were limited to those who were availing themselves of the free movement provisions. Mobility was linked to an economic activity which can be explained by fears over the burden that non-economically active, and thus non-tax paying, nationals of other Member States might become. The same fears hold true in relation to third-country nationals. Free movement of persons and an open border policy does not sit well with Member State governments who in general seek to protect their job market and their welfare system from migrants.[55]

This link between movement and economic activity was loosened throughout the 1990s due to specific secondary legislation, the introduction of the concept of citizenship in the Treaty of Maastricht, and case law. Three directives were adopted conferring general rights of movement and residence on the retired, students and the economically inactive, subject to the requirement that the individual had sufficient resources and medical insurance. These conditions clearly address the above described fears relating to welfare tourism.[56] These directives were replaced by Directive 2004/38/EC which codifies all entry and residence conditions for European

51 E Brouwer *Digital Border and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (Wolf Legal Publishers, Nijmegen 2006), p 13; Brouwer provides a thorough account of the abolition of the internal borders and the inclusion of the Schengen *acquis* into Union law, Brouwer 2006, chapter 2.

52 European Commission 1985, par 55.

53 Condinanzi, Lang and Nascimbene 2008, p 206; Brouwer 2006, p 15-17.

54 See also Single European Act, General Declaration on Articles 13 to 19 available online: <http://www.eurotreaties.com/seafinalact.pdf> (last visited 1 October 2015) indicating the wish to retain competence and the Single European Act, Political Declaration by the governments of the Member States on the free movement of persons, indicating the desire to cooperate; Condinanzi, Lang and Nascimbene 2008, p 206.

55 Barnard 2013, p 230-231.

56 Council Directive 90/364/EEC of 28 June 1990 on the rights of residence for persons of sufficient means OJ (1990) L180/26; Council Directive 90/365/EEC of 28 June 1990 on the rights of residence for employees and self-employed who have ceased their occupation activity OJ (1990) L180/28; Council Directive 93/96/EEC of 29 October 1993 on the rights of residence for students OJ (1993) L317/59.

Economic Area (EEA) citizens and their family members.[57] On a legislative parallel, with the introduction of citizenship of the Union in the Treaty of Maastricht all EU nationals were provided with the right to move and reside freely within the territory of the Member States.[58] EU citizenship and the rights related to it may have been intended as a symbolic gift, the European Court of Justice (ECJ)[59] certainly has not interpreted the citizenship provisions as such.[60] As indicated by the Court:

> Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[61]

Though the original provisions concerning the free movement of persons are almost unchanged since 1957, their scope and understanding have changed greatly. Not only the personal scope of the provision has expanded through additional statutory law and judicial interpretation, the consequences for the Union and national legal regimes are much greater than originally anticipated. Free movement of persons is now a much wider concept inextricably linked with European citizenship.[62] Crucially, the ECJ has contributed greatly to the realization of the internal market in general, and the free movement of persons in specific. Non-discrimination has led the Court to rule that the Member States have to accept a certain financial solidarity with non-economic migrants on the basis of a gliding scale. The longer the period of legal residence and the more integrated the migrant is in the society of the host state, the more that migrant can rely on equal treatment.[63] This gliding scale is evident in Directive 2004/38/EC as well. As will be discussed, entry to and residence on the territory of another Member State during the first three months is no longer linked to an economic activity. The same holds true for citizens who

57 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ (2004) L158/77; see for an explanation of the EEA this chapter, par 3.4.1.

58 Articles 20-25 TFEU.

59 The case law referred to in this book is limited to cases of the European Court of Justice. The addreviation 'the Court' is often used as well and only refers to the European Court of Justice. The term Court of Justice of the European Union (CJEU) will not be used as it addresses the institution itself, including the European Court of Justice, the General Court and the Civil Service Tribunal.

60 J Meulman and H de Waele 'Funding the life of Brian: Job Seekers, Welfare Shopping and the Frontier of European Citizenship' (2004) 31 *Legal Issues of Economic Integration*, p 275-288.

61 Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* ECLI:EU:C:2001:458, par 31.

62 Foster 2013, p 276. See for an extensive description: Condinanzi, Lang and Nascimbene 2008, chapter 1 and specifically, p 24.

63 Case C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* ECLI:EU:C:2005:169, par 56 and 59; C Barnard 'Case C-209/03, R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills' (2005) 42 *Common Market Law Review*, p 1488; see also this chapter, par 3.5.3.2.

have continuously resided in another Member State for five years.[64] The extended movement rights and the consequences for the welfare systems of the Member States are prime examples of the Member States unease to relinquish sovereignty. The developments of these concepts, through legislation and in particular case law, demonstrate that the interest of EU integration is sometimes diametrically opposed to these national interests.

3.2.4 The development of an EU immigration policy

The Benelux Agreement *acquis* was used as a model for what came to be known as the Schengen cooperation, leading to the signing of the Schengen Agreement in 1985 and the Schengen Implementing Convention in 1990.[65] The relevance of the Schengen Agreement to the topic at hand mostly lies in the facilitation of freedom of movement due to the confining of internal border checks to visual checks where this is possible.[66] The Schengen Agreement and its implementing convention itself only lay down common rules in order to ensure the internal border controls; as such they do not contain rules on the entry and residence of third-country nationals. Schengen introduces a uniform visa allowing short stay of up to three months. This stay is limited to that time frame and does not entail access to employment or service provision.[67] Moreover, the relevance of the Schengen Agreement lies in the fact that the removal of internal borders led to the adoption of so-called flanking measures. Initially, under the intergovernmental third pillar[68] measures related to border control and visa were adopted, as a shared outer border was perceived to require a common policy. The topic of migration was now part of the European agenda and the Maastricht Treaty saw the introduction of competence in the area of immigration. This brought *inter alia* movement of third-countries nationals to the territory of Member States, including access to employment, within the scope of EU law.[69] At the time of the signing of the Treaty of Amsterdam, most of the other Member States of the then EU-15 had become party to the Schengen Agreement. However, the United Kingdom and Ireland did not want to participate and

64 See this chapter, par 3.5.1.3.

65 Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Dutch Treaty Series 1985 no 102; Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. See for an extensive description of the development of the Schengen *acquis*: Brouwer 2006, chapter 2.

66 Chalmers, Davies and Monti 2014, p 528-529. Note that a passport check for EU nationals is still allowed, but only as a declaratory condition to verify EU nationality, case C-378/97 *Criminal proceedings against Florus Ariël Wijsenbeek* ECLI:EU:C:1999:439, par 42, 44 and 45.

67 Condinanzi, Lang and Nascimbene 2008, p 206-207.

68 See for a description of the institutional fragmentation known as the pillar structure: Craig and de Búrca 2015, p 10-13 referring to: D Curtin 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30:1 *Common Market Law Review*.

69 Article K(1)(3) TEU 1992.

therefore bringing the Schengen *acquis* into the scope of EU law was ensured through opt-outs for those Member States.[70] The Schengen area consists of all the EU Member States excepting the United Kingdom, Ireland, Cyprus, Bulgaria, Romania and Croatia. Four non-EU countries, Iceland, Liechtenstein, Norway and Switzerland, are also part of the Schengen area.[71]

The Treaty of Amsterdam (1999) saw the incorporation of the Schengen *acquis* into European law, and provided the EU institutions with legislative powers to develop a migration and asylum policy. The intergovernmental policy relating to the free movement of persons, introduced by the Treaty of Maastricht was transferred to Title IV of the Treaty establishing the European Community. Notably, this entailed that the competences relating to immigration were moved from the intergovernmental third pillar, to the supranational first pillar, be it that certain limitations applied.[72] Coupled with the policy areas of police cooperation and judicial cooperation in criminal matters, these activities create the so-called Area of Freedom, Security and Justice.[73] As indicated by the Commission, immigrants should enjoy 'broadly the same rights and responsibilities as EU nationals' and that 'action to integrate immigrants into our societies must ... be seen as the essential corollary of the admission policy'.[74] Interestingly, the Commission indicates that:

> In particular, under the General Agreement on Trade in Services (GATS), the EC and its Member States have committed themselves to allow third country nationals to pursue economic activities in the EU according to schedules allowing the presence of natural persons without requiring an 'economic needs test' for the provision of services under specific cases. Future commitments will be agreed under the GATS 2000 negotiations [...].[75]

Consequently, since 1999 the EU institutions have created and adopted various measures related to the admission and status of third-country nationals in relation to the EU Member States. Up to 2005 few of these measures genuinely deal with admission, focusing instead on measures to control migration such as visa regula-

70 See for a description of differentiated integration: K Junge 'Differentiated European Integration' in M Cini *European Union Politics* (Oxford University Press, Oxford 2007), chapter 24.

71 See the European Union information website on Schengen: <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm> (last visited 1 October 2015). Note that the Member States that are not part of the Schengen area do participate to some of the Schengen measures.

72 Brouwer 2006, p 35; the legislative basis, Article 67 Treaty establishing the Economic Community (TEC), initially only involved the European Parliament in a consultative role while the Council decided on the basis of unanimity. Review by the ECJ was limited as well, see Article 68 TEC regarding the preliminary procedure (Article 267 TFEU).

73 This is incorporated in Title V of the TFEU.

74 Communication 'from the Commission to the Council and the European Parliament on a Community immigration policy' COM (2000) 757, par 14.

75 European Commission 2000a, par 14.

tions, border control, preventing migration and the return of illegal immigrants.[76] The 2001 Commission proposal for a directive concerning the conditions of entry and residence of third-country nationals for the purpose of employment and self-employment failed due to a lack of support on the issue within the Member States.[77] As noted by Groenendijk, some Member States were clearly opposed to the proposal and the general idea of binding Union law covering the issue of admission of third-country nationals for employment.[78] Nevertheless, agreement was reached on legislative acts concerning family reunification, the status of EU long-term residents, the conditions of admission of third-country national students and measures facilitating the admission of third-country national researchers.[79] The Commission again placed the need of Union rules concerning the admission of economic migrants on the agenda in 2005 with a Green paper and the adoption of a policy plan on legal migration, leading to a package of proposals concerning admission conditions and procedures for third-country nationals relating to several specific topics.[80] This package contains the following proposals:

- A directive on the conditions of entry and residence of highly skilled workers (Blue Card Directive);[81]
- A directive on the conditions of entry and residence of seasonal workers;[82]
- A directive on the procedures regulating the entry into, the temporary stay and residence of Intra-Corporate Transferees;[83]
- A single directive (incorporating the Students Directive and Researchers Directive) on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing.[84]

76 K Groenendijk 'Access of Third-Country Nationals to Employment under the New EC Migration Law' in F Julien-Laferrière, H Labayle and O Edström (eds) *The European Immigration and Asylum Policy: Critical Assessment Five Years after the Amsterdam Treaty* (Bruylant, Brussels 2005), p 141-142.

77 Commission proposal for a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM (2001) 386, final.

78 Groenendijk 2005, p 145-146.

79 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ (2003) L251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ (2004) L16/44; Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ (2004) L375/12; Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ (2005) L289/15.

80 European Commission Green Paper 'An EU Approach to Managing Economic Migration' COM (2004) 811, final; European Commission 'Policy Plan on Legal Migration' COM (2005) 669, final.

81 Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJ (2009) L155/17.

82 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ (2014) L98/375.

83 Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer OJ (2014) L157/1.

84 Commission proposal on a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing COM (2013) 151, final.

- A directive on a single procedure and permit in relation to a residence and work permit.[85]

With the exception of the Blue Card Directive, a fundamental difference with the 2001 proposal is that these directives are not intended to regulate entry and residence conditions, rather they address the conditions and the procedures of admission for four categories of economic migrants.[86] The Single Permit Directive entails that Member States must provide one procedure and permit in relation to residence and work permits for third-country nationals. This has influenced Dutch migration law but the admission of GATS service suppliers was left out of the national law implementing this directive. The UK has opted out of all these initiatives.[87] All of these directives but the Blue Card Directive were formulated with a specific concern in mind. They address migrants who are already granted a residence permit, after which they gain access to the activities addressed in the directives and under the conditions specified in the directive. The Blue Card Directive does provide primary entry in relation to highly-skilled third country nationals for employment purposes, but it does not apply to self-employed persons.[88] These directives will not be discussed further here.

These initiatives demonstrate the previously described tension between freedom of movement and the interest of the Union to improve the conditions for third-country nationals, and the Member States reluctance to relinquish sovereignty over this policy area.[89] From reluctance to accept movement rights for non-economically active EU nationals, to the difficulties in accepting movement rights for third-country nationals, the emerging image remains consistent. Countering this reluctance is the constant move towards additional EU legislation in freedom of movement policy areas. This constant move towards more integration is not by chance and is in part exactly what Jean Monnet's plans for the ECSC were built on. Where political union proved too ambitious, the opening moves of European integration were to be achieved through sectoral integration with political union as the ultimate endgoal.[90] Theoretically, this mechanism may also be explained by the fact that adopting policies in one area leads to problems in other areas. A perfect example being the connection between the internal market, leading to the removal of the national borders which leads to the adoption of additional policies to deal

85 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country workers legally residing in a Member State OJ (2011) L343/1.
86 European Commission 2004; European Commission 2005, p 5.
87 Chapter 5, par 5.2.2; House of Lords, European Union Commission 'The EU's Global Approach to Migration and Mobility' 18 December 2012, HL Paper 91, p 79.
88 Directive 2009/50/EC, Article 1a and 2b.
89 Chapter 1, par 1.1.
90 Urwin 2007, p 18-19; C Strøby-Jensen 'Neofunctionalism' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007), p 86, referring to the so-called Monnet method of European integration.

with the removal of such borders. The result is European legislation in relation to migration and criminal matters, which certainly belong to the core of a state's sovereignty.[91] The tendency of adoption of policies in one area leading to the adoption of policies in other areas has greatly influenced the EU *acquis* in general, and free movement of persons and migration policy in specific. This spillover effect indicates that political co-operation aimed at a certain goal, leads to new goals in order to reach the original goal. The original aim might be mobility of workers, but without movement rights for families, this goal will be hard to achieve.[92] It is important to keep the original aim, the abolition of barriers to free movement, in mind as it demonstrates that the integration process and this spillover effect are continuous today.

3.2.5 Completing the internal market and the Services Directive

As indicated, the Single European Act aimed towards the 'completion of the internal market' by 1992.[93] The internal market for service providers was to be reached by sector-specific secondary legislation, addressing the most obstructed and economically important service sectors. In addition, the ECJ market access approach aimed at the removal of non-discriminatory barriers to trade in services.[94] The 1997 Action Plan for the Single Market[95] listed policy proposals in four strategic target areas with the inclusion of implementation timetables. Strategic target three, 'removing sectoral obstacles to market integration' contained various policy proposals to 'break down the barriers in service markets'.[96] The proposals related to specific sectors such as business and professional services which, according to the Commission, could benefit from (regulatory) simplification at the national level. Financial services were hampered by a lack of a true Single Market for investment funds. Other targeted sectors were the utilities and air transport service sectors.[97] This approach theoretically should address all unnecessary restrictions to services trade; difficult sectors were tackled with secondary legislation, while the ECJ required the abolishment of any restriction unless objectively justified. Nevertheless, the feeling was that the ECJ only addressed a few cases dealing with restrictions to service trade, leaving many impediments to cross-border provision unaddressed.[98] As in-

91 This theoretical framework is most evident in the thinking of neo-functionalists, see extensively Strøby-Jensen 2007, p 88-89.
92 Strøby-Jensen 2007, p 90-91.
93 This chapter, par 3.2.3.
94 De Witte 2007, p 4-5; this chapter, par 3.5.1.1.
95 European Commission 'Communication of the Commission to the European Council Action Plan for the Single Market' CSE (1997) 1, Final.
96 European Commission 1997, p 7-8. The Annexes contain timetables structured in three implementation phases.
97 European Commission 1997, p 7-8.
98 De Witte 2007, p 6. See also the European Commission website 'A Single Market for Services' <ec.europa.eu/internal_market/top_layer/services/index_en.htm> (last visited 1 October 2015).

vited by the Lisbon Presidency Conclusions, in 2000 the Commission issued a Communication containing plans regarding an Internal Market Strategy for Services to fulfil the aims of the Lisbon Strategy.[99] While initiating several activities directed at specific service sectors, the Commission expressed its view that these measures would not be sufficient to achieve a true internal services market.[100] The Commission plan to reach that aim envisaged a horizontal approach to free movement of services.[101] As preparation for this horizontal Directive, the Commission identified existing barriers to trade in services in all the Member States. The resulting report on 'The State of the Internal Market for Services' identified over 90 barriers restricting competition in services.[102] These barriers were categorized into legal barriers obstructing establishment, the use of inputs required for service provision, promotion, distribution sales and after-sales aspects of services. The study also indicates non-legal barriers relating to lack of information and cultural and language barriers. With the barriers to service trade identified, the background to the existence of these barriers categorized and an extensive overview of the impact of these barriers in hand, the Commission developed solutions to the problems identified in the form of a draft Services Directive (SD).[103] As will be discussed below,[104] the final outcome of the negotiations relating to that draft is nowhere near the ambition of the Commission.[105] The rejected first draft contained the principle of home state control, which roughly entailed that all attempts at regulating services by the host state were considered suspect as barriers to trade. This principle was not included in the final text. Moreover, concerns relating to the impact of the Services Directive, in particular relating to social protection systems of Member States, have led to the exclusion of various service sectors and topics, resulting in a patchy legislative instrument.[106]

99 Lisbon European Council meeting 23 and 24 March 2000, Presidency Conclusions, par 8; European Commission 'Communication from the Commission to the Council and the European Parliament, An Internal Market Strategy for Services' COM (2000) 888, final.

100 European Commission 2000, p 7-8, these initiatives urged the Council and Parliament to complete already launched Internal Market proposals impacting on specific sectors such as a telecommunications package, two public procurement directives and the Postal Services Directive. Moreover, several new activities would be initiating directed at specific service sectors such as commercial communications, regulated professions, financial services and electronic commerce.

101 As indicated by Barnard, though the horizontal approach was criticized by some, addressing 83 non-financial service sectors through sector specific legislation would consume too much time and effort, C Barnard 'Unravelling the Services Directive' (2008) 45 *Common Market Law Review*, p 327.

102 European Commission 2002.

103 Commission proposal for a Directive of the European Parliament and of the Council on services in the internal market COM (2004) 2, final.

104 This chapter, par 3.5.1.3.

105 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ (2006) L376/36.

106 Craig and de Búrca 2015, p 850.

3.3 The scope of the freedom to provide services

As is the case under WTO law, EU law does not provide a definition of services. This is unsurprising given the problems to come up with an all-encompassing definition to capture the concept.[107] The TFEU provides several scarce clues and defines the concept of services negatively by indicating what should not be considered to fall within the scope of the freedom to provide services.

> Article 56 TFEU
> Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.
> The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.

> Article 57 TFEU
> Services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.
>
> 'Services' shall in particular include:
> (a) activities of an industrial character;
> (b) activities of a commercial character;
> (c) activities of craftsmen;
> (d) activities of the professions.
>
> Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the Member State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

Comparing the TFEU provisions with the original Articles 59 and 60 of the EEC Treaty reveals no relevant changes in language. The few changes in words relate to the shift from the European Economic Community to the European Union, the ending of the transitional period during which restrictions were progressively abol-

107 Chapter 2, par 2.3.5.1.

ished, and changes in the legislative procedures.[108] As is apparent from these Treaty provisions, services are all activities that are normally provided for remuneration, except those falling within the scope of the freedom of movements for goods, capital and persons.

Defining services touches the blurry and politically sensitive lines between trade in services on the one hand, and immigration or foreign direct investment on the other,[109] and between employment and self-employment.[110] Within the GATS framework, the solution to definitional problems was found in circumvention. The GATS focuses on the different ways in which trade in services can be conducted. The GATS therefore provides a definition for trade in services, but leaves the problem of what constitutes a service alone.[111] EU law similarly evades the problem of providing a definition. Services are considered to be economic activities which are not governed by the freedom of movement for workers, the freedom of establishment and the free movement of capital. An additional problem with this definition is that the other fundamental freedoms are left without a Treaty definition as well.[112]

This negative definition is understandable when considering the conditions that existed at the time when the EEC provisions were drafted. As services emerged as the tertiary economic sector, the concept was defined as a residual category.[113] The scope of the freedom to provide services is therefore determined by various factors. This paragraph will address the general conditions determining whether the free movement provisions apply, the nationality requirement, the need for an economic activity and the need for an inter-state element. Due to the negative formulation of services, the scope of the other fundamental freedoms will be examined first. The paragraph will then conclude with the defining elements constituting service provision.

3.3.1 General scope of the free movement provisions

In general, as fundamental principles of the Union, the Court has insisted that the free movement provisions, and therefore their defining terms, must be interpreted

108 Examples are words changed from 'Community' to 'Union', from 'progressively abolished' to 'prohibited', from 'The Council' to 'The European Parliament and the Council' and from 'Treaty' to 'Treaties'.

109 ATF Lang 'GATS' in D Bethlehem, D MacRae, R Neufeld and I van Damme (eds) *International Trade Law* (Oxford University Press, Oxford 2009), p 161.

110 As will become clear in this chapter, par 3.4.2 and 3.4.3.

111 As does the GATS, chapter 2, par 2.3.5.2.

112 Barnard 2013, p 274, 304 and 583.

113 See extensively, V Hatzopoulos *Regulating Services in the European Union* (Oxford University Press, Oxford 2012), p 4-11.

broadly. These interpretations are based on objective criteria, interpreted by the Court, to ensure uniform interpretation across the Member States.[114]

3.3.1.1 Personal scope

The free movement provisions themselves only apply to EU nationals.[115] Article 45 TFEU refers to 'workers of the Member States', while Articles 49 and 56 TFEU address nationals of the Member States. Since the introduction of EU citizenship, movement is connected to that status as Article 20 and 21 TFEU provide movement rights for 'citizens of the Union'. Directive 2004/38, which codifies these movement rights, also speaks of citizens of the Union. This does not change the scope of Articles 45, 49 and 56 TFEU as citizenship of the Union is granted to every national of a Member State. Whether someone is a national of a Member State is a matter of national law[116] which cannot be contested by other Member States.[117] With regard to economic activities of companies (or firms), it is the company seat which functions as the nationality. A company's seat refers to the state according to which laws the company is formed, where it has its registered office, central administration, or where it has its principal place of business.[118] Thus, regarding the nationality requirement, companies may rely on the free movement provisions if they are formed in accordance with the law of one of the Member States and their seat is established in one of the Member States.

3.3.1.2 Economic activity

Article 57 TFEU contains the definitional words 'services', 'activity' and 'normally provided for remuneration'. These elements express the general concept that, initially, Union law applied to economic activities. Consequently, Member States re-

114 In relation to the free movement of goods: case 8/74 *Procureur du Roi v Benoît and Gustave Dassonville* ECLI:EU:C:1974:82, par 5; in relation to the free movement of workers: case 139/85 *R.H. Kempf v Staatssecretaris van Justitie* ECLI:EU:C:1986:223, par 13 and case 53/81 *D.M. Levin v Staatssecretaris van Justitie* ECLI:EU:C:1982:105, par 13; in relation to the free movement of services: case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* ECLI:EU:C:1991:331, par 12; in relation to the free movement of establishment: case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECLI:EU:C:1995:411, par 37.

115 The freedom of movement of capital also applies to restrictions on capital movements between Member States and third countries.

116 Case C-369/90 *Micheletti and Others v Delegación del Gobierno en Cantabria* ECLI:EU:C:1992:295, par 10; case C-192/99 *R. v Secretary of State for the Home Department, ex p. Kaur* ECLI:EU:C:2001:106, par 19. Note that withdrawal of nationality is subject to review in light of European Union law, see case C-135/08 *Janko Rottman v Freistaat Bayern* ECLI:EU:C:2010:104.

117 Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* ECLI:EU:C:2004:639, par 34 and 39.

118 Article 54 TFEU; Barnard 2013, p 232-233, referring to: case C-330/91 *R. v Inland Revenue Commissioners, ex p. Commerzbank AG* ECLI:EU:C:1993:303, par 13 and case C-210/06 *Cartesio Oktató és Szolgáltató bt* ECLI:EU:C:2008:723, par 109. As explained by Craig and de Búrca, this holds true even if the business of the company itself is conducted through subsidiaries established in other Member States, case 79/85 *D.H.M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en. Verzekeringswezen, Groothandel en Vrije Beroepen* ECLI:EU:C:1986:308, par 16, Craig and de Búrca 2015, p 810.

tain autonomy regarding non-economic activities.[119] This holds true for the free movement of workers, the freedom of establishment and free movement of service providers.[120] Moreover, the provisions on competition only apply to undertakings, which are defined by the Court as 'every entity engaged in an economic activity'.[121] However, the concept 'economic activity' in relation to the free movement provisions is not exactly the same as the concept for the purpose of competition.[122] Besides the words used in Article 57, various defining words are used to address the need for this element, depending on the specific Treaty provision in question. In relation to the free movement of workers, the ECJ used the definition: 'performs services (...) for which he receives remuneration'.[123] Article 43 TFEU only refers to 'activities' of the self-employed. However, the Court provides that the provision concerning establishment relates to 'an economic activity pursued by a self-employed person'.[124]

Addressing all three fundamental freedoms simultaneously, the Court provides that:

> The situation of a [Union] national who moves to another Member State of the [Union] in order there to pursue an *economic activity* is governed by the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services (...).[125]

In relation to the scope of the free movement of workers, establishment and services provisions, the concept economic activity has two elements: the demand or

119 O Odudu 'Economic Activity as a Limit to Community Law' in C Barnard and O Odudu *The Outer Limits of European Union Law* (Hart Publishing, Oxford 2009), p 225; see also: case T-319/99 *Federación Nacional de Empresas de Instrumentatión Científica, Médica, Técnica y Dental (Fenin) v Commission* Opinion AG Maduro ECLI:EU:T:2003:50, par 26.

120 Odudu 2009, p 225-227.

121 Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* ECLI:EU:C:1991:161, par 21; see also case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* Opinion AG Jacobs ECLI:EU:C:1999:28, par 206.

122 See extensively: Odudu 2009, p 228, referring *inter alia* to: case C-519/04P *David Meca-Medina and Igor Majcen v Commission* ECLI:EU:C:2006:492, par 22.

123 Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* ECLI:EU:C:1986:284, par 17.

124 Case C-268/99 *Aldona Malgorzata Jany and others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616, par 71. The facts of the Jany case concerned a Czech and a Polish national at a time before the accession of Poland and the Czech Republic. The case was decided on the basis of the association agreements between the Union and Poland and the Czech Republic. As nothing suggests an intended difference between the freedoms of movement for self-employed persons in those association agreements compared to the parallel freedom of movement provisions in the TFEU, the ECJ interpreted these provisions in the same manner. Thus, ECJ case law concerning the free movement provisions in such association agreements is applicable to interpreting TFEU free movement provisions, *Jany*, par 36-38. Note that due this does not apply to Article 41(1) of the Additional Protocol to the Agreement establishing an Association between the European Economic Community and Turkey, see case C-221/11 *Leyla Ecem Demirkan v Bundesrepublik Deutschland* ECLI:EU:C:2013:583, par 49-55. The Ankara Agreement and the Additional Protocol are described in this chapter, par 3.4.3.

125 *Gebhard*, par 20, emphasis added; see also: joined cases C-180/98 to C-184/98 *Pavel Pavlov and Others v Stichting Pensioenfonds Medische Specialisten* ECLI:EU:C:2006:428, par 75.

supply of services to the market and the element of remuneration.[126] The first element entails that 'the provider satisfies a request by the beneficiary in return for consideration without producing or transferring material goods'.[127] Examples of such activities are provided in Article 57 TFEU. The second element which constitutes an economic activity is remuneration.[128] Profit for the service provider is not necessary, remuneration is defined as 'consideration for the service in question (...) normally agreed upon between the provider and the recipient of the service'.[129] Moreover, the remuneration can be provided by another than the receiver of the service.[130] What does matter is the method of financing the service provision, as services financed entirely or mainly by the public fund are exempted from the Treaty provisions. For example, courses provided by educational institutions that are financed entirely or mainly by the public fund do not fall within the scope of the freedom to provide services.[131] Consequently, education provided by private schools must be regarded as a service provided for remuneration.[132] The amount of remuneration is not what determines whether an activity is indeed economic. In relation to the remuneration provided to workers, the Court ruled that a trainee teacher qualified as a worker, the fact that the salary was less than a full teacher's salary was irrelevant.[133] The Court went even further in the *Steymann* case. That case concerned a member of a religious community providing plumbing work, general household duties and other commercial activities on that community's presence. In return, the religious community took care of Steymann's material needs and provided some pocket-money. The Court ruled that this could also constitute remuneration.[134]

3.3.1.3 Services of general economic interest

Services financed entirely or mainly by public funds are non-economic services. This is not the same as services of general economic interest. A definition of that last concept is '(...) market and non-market services which the public authorities

126 Odudu 2009, p 229.
127 *Jany*, par 48.
128 *Jany*, par 33.
129 Case 263/86 *Belgian State v René Humbel and Marie-Thérèse Humbel née Edel* ECLI:EU:C:1988:451, par 17.
130 Case 352/85 *Bond van Adverteerders and Others v The Netherlands* ECLI:EU:C:1988:196, par 16.
131 *Humbel*, par 17; see also case C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and. H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringen* ECLI:EU:C:2001:404, par 58; case C-318/05 *Commission v Germany* ECLI:EU:C:2007:495, par 68.
132 *Commission v Germany* (C-318/05), par 69-72; case C-109/92 *Stephan Max Wirth v Landeshauptstadt Hannover* ECLI:EU:C:1993:196, par 17; see also case 36/74 *Walrave and L.J.N. Koch v Association Union cycliste internationale* ECLI:EU:C:1974:140, par 17-19, where the Court explains that the sphere (in casu sports and rules adopted by a sports association) where the activity is carried out is irrelevant.
133 *Levin*, par 15 and 16; *Lawrie Blum*, par 21.
134 Case 196/87 *Steymann v Staatssecretaris van Justitie* ECLI:EU:C:1988:475, par 11-12; case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles* (CPAS) ECLI:EU:C:2004:488, par 16-18; see also: Craig and de Búrca 2015, p 752-753.

class as being of general interest and subject to specific public service obligations'.[135] From the perspective of Article 106 TFEU it is exactly the economic nature of the service of general economic interest which triggers the EU competition law rules.[136] Examples of service sectors which consist of services of general economic interest are the electricity, gas, telecommunications, postal and transport sector.[137] While 'general' refers to a service in the public interest, which normally indicates a non-economic nature, services of general interest can also be of an economic nature.[138] Services of general economic interest are not exempt from the scope of EU law, as is the case under the GATS. However, Member States may justify restrictive measures if the service in question relates to a service of general economic interest.[139]

3.3.1.4 Inter-state element

As is apparent from the phrase: '(...) in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended',[140] the Treaty requires an interstate element in order for service provision to fall within the scope of Union law. So-called wholly internal situations are not covered by EU law. This requirement applies to all movement provisions.[141] In the words of the Court: 'the provisions in the Treaty relating to freedom of movement for persons do not apply to situations which are purely internal to a Member State'.[142] In general, Union law does not apply 'to activities which have no factor linking them with any of the situations governed by [Union] law and which are confined in all respects within a single Member State'.[143] Jurisprudence of the ECJ demonstrates that this requirement is not as strict as it may seem. Phrased

135 European Commission 'Communication from the Commission – Services of general interest in Europe' OJ (2001) C17/4, annex II.

136 Case C-49/07 *Motosykletistiki Omospondia NPID (MOTOE) v Elliniko Dimosio* ECLI:EU:C:2008:376, par 46 and 47.

137 U Neergaard 'Services of General Economic Interest: the Nature of the Beast' in M Krajewski U Neergaard and J van de Gronden (eds) *The Changing Legal Framework for Services of General Interest in Europe* (T.M.C. Asser Press, The Hague 2009), p 22.

138 Neergaard 2009, p 21. The topic of services of general economic interest will not be discussed here, for further reading see: M Krajewski U Neergaard and J van de Gronden (eds) *The Changing Legal Framework for Services of General Interest in Europe* (T.M.C. Asser Press, The Hague 2009).

139 J van de Gronden 'Transnational Competition Law and Public Services' in C Herrmann, M Krajewski and JP Terhechte (eds) 2013 *European Yearbook of International Economic Law* (Springer-Verlag, Berlin 2013), p 115 and 126-127.

140 Article 56 TFEU.

141 Grzelczyk, par 32.

142 Case C-19/92 *Dieter Kraus v Land Baden-Württemberg* ECLI:EU:C:1993:125, par 15; case 115/78 *Knoors v Staatssecretaris voor Economische Zaken* ECLI:EU:C:1979:31, par 24 and case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434, par 23. However, in the Zambrano case the Court precluded national measures depriving EU citizens of the genuine enjoyment of their rights as EU citizens, even if such rights have not been exercised, case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* ECLI:EU:C:2011:124.

143 Joined cases C-225/95 to 227/95 *Kapasakalis and Others v Greek State* ECLI:EU:C:1998:332, par 22; see for an example of a purely internal situation in relation to broadcasting services: case 52/79 *Procureur du Roi v Debauve* ECLI:EU:C:1980:83, par 9.

differently, various situations which might appear limited to a single Member State in fact have an interstate element. Firstly, the movement provisions prevent a Member State from restricting their own nationals from leaving the territory.[144] As such, residents of a Member State can challenge measures as they are prevented from using their movement rights. Secondly, an increasing number of cases deals with obstacles provided by the home state which do fall within the scope of EU law.[145] In *Deliège* a Belgian national challenged the selection rules of the Belgian Judo Federation, yet the Court found that this could be classified differently than as a wholly internal situation. The fact that the athlete participates in a competition held in another Member State than where she was established may lead to a degree of extraneity.[146] In *Knoors* the Court ruled that a Member State must recognize quailfications obtained abroad by that Member States own nationals. The Court:

> (...) the reference in Article 52 to 'nationals of a Member State' 'who wish to establish themselves' 'in the territory of another Member State' cannot be interpreted in such a way as to exclude from the benefit of [Union]law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of [Union] law, are, with regard to their state of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty.[147]

As such, when EU citizens utilize their movement rights and then return to their state of origin, those movement provisions, and the prohibition of discrimination, can continue to have effect. In *Asscher* a Dutchman could rely on the freedom of establishment against his own Member State as he had 'pursued economic activities at the same time in the Netherlands and in Belgium and those dual activities have had direct repercussions on the calculation of his income tax in the Netherlands'.[148] As expressed by the Court in *Singh* in relation to entry and residence rights for family members accompanying a Union citizen enjoying movement rights:

144 Craig and de Búrca 2015, p 807 (in relation to Article 49 TFEU). Article 56 TFEU addresses restrictions preventing a service provider from moving to a receiver in another Member State, this includes restrictions imposed by the home state; Article 4 Directive 2004/38/EC.

145 Barnard 2008, p 359; see in particular case C-405/98 *Gourmet International Products AB (GIP)* ECLI:EU:C:2001:135, par 37; see also: case C-18/93 *Corsica Ferries Italia v Corpo dei Piloti del Porto di Genova* ECLI:EU:C:1994:195, par 30 and case C-384/93 *Alpine Investments BV v Minister van Financiën* ECLI:EU:C:1995:126, par 30.

146 Joined cases C-51/96 and C-191/97 *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL* ECLI:EU:C:2000:199, par 58.

147 *Knoors*, par 24; *Kraus v Land Baden-Württemberg*, par 15; case C-107/94 *P.A. Asscher v Staatssecretaris van Financiën* ECLI:EU:C:1996:251, par 31 and 32.

148 *Asscher*, par 33.

> A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.[149]

The UK had to provide entry and residence rights equivalent to those provided under the Treaty and in secondary law in respect to family members of its own national. That this situation was not considered as wholly internal relates to the use of movement rights by Mrs. Singh.[150] In *Gourmet* a measure restricting potential advertisers established in another Member State fall within the scope of the freedom to provide services. Thus, an undertaking offering advertising space could challenge measures by the Member State in which that undertaking was established due to the detrimental effect to potential clients established in another Member State.[151] Finally, the *Carpenter* case is a prime example of just how far the movement provisions can stretch to challenge measures of the home state. In *Carpenter* British immigration rules resulting in the deportation of the Filipina spouse of Mr Carpenter were considered to deter the right of Mr Carpenter to provide services in other Member States. After rejecting the argument based on the *Knoors* and *Asscher* cases due to the fact that Mr Carpenter had not exercised his rights to freedom of movement,[152] the Court indicated that the deportation would damage Mr Carpenter's family life. This interference with his family life would be detrimental to the conditions under which Mr Carpenter could exercise his business selling advertising space, thus forming a barrier to the free movement of service providers.[153]

3.3.1.5 Abuse of Union law

There are several cases dealing with the alleged improper use of rights created by the Treaty to circumvent national legislation. In the *Van Binsbergen* case the Court stated that a Member State has the right to prevent misuse of the freedom to provide services when that service is entirely or principally directed towards its territory for the purpose of avoiding the national rules that would be applicable had the

149 Case C-370/90 *The Queen, ex parte Secretary of State for the Home Department v Immigration Appeal Tribunal and Surinder Singh* ECLI:EU:C:1992:296, par 18 and 19.
150 *Singh*, par 20 and 21.
151 *Gourmet*, par 39.
152 *Carpenter*, par 24.
153 *Carpenter*, par 29 and 39; Barnard 2008, p 358-359.

service provider operated from its own territory.[154] The abuse of Union law argument was used by trade unions in the *Laval* case.[155] In essence, the argument was that the factual Member State from which Laval operated was Sweden and not Latvia, where it was formally established. The Court rejected the argument as the dispute concerned the terms and conditions of employment that apply to Latvian workers posted in Sweden. Moreover, those workers returned to Latvia after the suspension of the work caused by the collective action, indicating that there was no intention of enabling Latvian workers to gain access to the Swedish employment market. Therefore, the dispute concerned the posting of workers in another Member State with the intention of providing a service.[156] This last argument is derived from the *Rush Portuguesa* case where the Court held that posted workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.[157] In *Laval* an argument raised by the trade unions claiming that EU law was abused was the competitive advantage Laval has if it is able to use Latvian workers without being bound by Swedish law concerning working conditions. This possibility is based on the general difference between establishment, where the law of the host Member State applies, and services, which is, in principle regulated by the home Member State.[158] As will be discussed below, it is exactly this possible gap that Directive 96/71/EC tries to fill.[159]

3.3.1.6 Rules structuring the market and remote impediments to trade

The broad definitions of the free movement provisions, and in particular the 'market access' approach adopted by the Court, leads to a very wide field of application.[160] A well-known consequence was that the Court extended the justification grounds.[161] Moreover, in the sphere of free movement of goods the Court limited the application of the Treaty provision in relation to rules which were not intended to be covered by that freedom.[162] In the context of the free movement of goods, this approach was adopted in the *Keck* judgment which exempts selling arrangements

154 Case 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* ECLI:EU:C:1974:131, par 13; *Knoors*, par 25. This ruling was repeated several times, see in particular: case C-212/97 *Centros Ltd v Erhvervs-og Selskabsstyrelsen* ECLI:EU:C:1999:126, par 24.

155 For a more extensive description see: S Tans 'Case note Laval, 18 December 2007 (Case C-341/05) and Viking, 11 December 2007 (C-438/05)' (2008) 10 *European Journal of Migration and Law*, see in particular par 4 and 5.4.

156 Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* ECLI:EU:C:2007:809, par 48 and 49. Thus Laval fulfils the definition of Directive 96/71/EC Article 1(1) in conjunction with 1(3) b as it is an undertaking established in a Member State posting workers to an undertaking owned by Laval (Baltic) in the territory of a Member State, while those workers have an employment relationship with Laval.

157 Rush Portuguesa, par 15; see further this chapter, par 3.4.2.

158 Case C-215/01 *Bruno Schnitzer* ECLI:EU:C:2003:662859, par 33.

159 This chapter, par 3.5.3.1.

160 This chapter, par 3.5.1.1.

161 This chapter, par 3.5.2.

162 Barnard 2008, p 405; Craig and de Búrca 2015, p 682-683.

from the scope of Article 34 TFEU, be it that these measures may not be discriminatory.[163] Regarding free movement of persons, problems relating to the broadness of the scope of the provisions were identified as well.[164] The Court has tried to cope with this problem by exempting certain rules such as selection rules for international sport competitions.[165] For example rules relating to administrative penalties imposed for non-compliance, or road traffic rules, do not target service provision as individuals in private capacities need to observe them as well.[166] Similarly, rules whose effect on free movement is too remote or insubstantial are exempted as well.[167] However, most measures affecting the freedom of movement provisions, including potential effects, are regulated by the Treaty provisions.[168]

3.3.2 The scope of the other free movement provisions

It is difficult to separate the four freedoms along clear lines, a matter which is moreover not dealt with in the Treaty provisions.[169] It was therefore the ECJ which has defined the scope of the four freedoms. Providing these definitions were not without considerable difficulties, in particular in respect of the dividing lines between the freedom to provide services on the one hand, and the freedom of establishment and free movement of workers on the other. Separating services from goods can cause similar difficulties as is apparent from the definitional debates held during the creation of the GATS.[170] Early on the ECJ, in a case relating to free movement of workers, ruled that these concepts exclusively have a Union law definition. The consistent argument used by the Court is that leaving these definitions to national law could lead to differing definitions endangering the uniform application of EU law.

> If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of 'migrant worker' and to eliminate at will the protection afforded by the Treaty to certain categories of person.

163 Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* ECLI:EU:C:1993:905, see for an overview: Craig and de Búrca 2015, chapter 19, par 5.

164 Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation v Commissioners of Inland Revenue Opinion AG Geelhoed* ECLI:EU:C:2006:773 and case C-442/02 *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie Opinion AG Tizzano* ECLI:EU:C:2004:586.

165 See for an example: Deliège, par 64.

166 See the 9th recital of the Services Directive which lists measures such as road traffic rules, rules concerning land development, building standards and administrative penalties imposed for non-compliance, Directive 2006/123/EC.

167 Case C-190/98 *Graf v Filzmozer Maschinenbau GmbH* ECLI:EU:C:2000:49, par 24-25.

168 Case C-168/01 *Bosal Holding BV v Staatssecretaris van Financiën* ECLI:EU:C:2003:479 where a Dutch tax rule could lead companies to withhold activities through a subsidiary in another Member State. As noted by Barnard, that decision cost the Dutch treasury millions, Barnard 2008, p 258.

169 See for example, *Schnitzer*, par 31.

170 Chapter 2, par 2.3.5.1.

> Articles 48 to 51 would therefore be deprived of all effect and the abovementioned objectives of the Treaty would be frustrated if the meaning of such a term could be unilaterally fixed and modified by national law. The concept of 'workers' in the said Articles does not therefore relate to national law, but to [Union] law.[171]

The scope of the fundamental freedoms tends to overlap. At a certain point temporary service provision ends, leading to establishment. Free movement of capital is closely related to financial services. Finally, the director of an undertaking, though working in the service of that undertaking, is considered to be self-employed. Consequently, measures of Member States can restrict two fundamental freedoms simultaneously. In the *Omega* case a German measure prohibiting the exploitation of a laser game simulating the killing of human beings was prohibited. The measure restricted the provision of a service, while simultaneously restricting the use of the equipment needed for these games (laser guns and suits with sensors), affecting their import.[172] In principle, the Court deals with such cases by examining such measures from one fundamental freedom only:

> [W]here a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it (...).[173]

However, if priority cannot be established the Court will examine the measure from the viewpoint of both fundamental freedoms simultaneously. An example can be found in the *Canal Satélite Digital* case. The subject of that case was telecommunications, a field that according to the Court is difficult to determine generally whether the free movement of goods or the freedom to provide services takes priority.[174] The negative formulation of services in Article 56 TFEU, i.e. that service provision forms the residual category in relation to the other fundamental freedoms, does not establish priority.[175] Establishing priority relates to the facts of a

171 Case 75/63 *Unger v Bedrijfsvereniging voor Detailhandel en Ambachten* (also known as *Hoekstra*) ECLI:EU:C:1964:19.

172 Case C-36/02 *Omega Spielhallen – und Automatenaufstellungs-GmbH v Oberbürgemeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614, par 25.

173 *Omega*, par 26; case C-390/99 *Canal Satélite Digital SL v Adminstración General del Estado, and Distribuidora de Televisión Digital SA (DTS)* ECLI:EU:C:2003:34, par 31; case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* ECLI:EU:C:2004:181, par 46; case C-20/03 *Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong* ECLI:EU:C:2005:307, par 35; case C-452/04 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht* ECLI:EU:C:2006:631, par 34.

174 *Canal Satélite Digital*, par 33.

175 *Fidium Finanz*, par 32 and 33.

specific case; the Treaty provisions concerning the fundamental freedoms do not establish any inherent priority.

3.3.2.1 Definition of labour

The term worker defines the scope of the freedom of movement of workers,[176] but it is not included in the Treaties.[177] In *Lawrie-Blum*, a case concerning the question whether a trainee teacher would fit the Union definition of a worker, the Court provided three criteria defining the term worker within the meaning of the Treaty:

> The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.[178]

As such, a worker provides a service, directed by another person, in return for remuneration. The essential criterion in relation to the scope of the freedom to provide services is the relationship of subordination, i.e. if they are under the control of the employer. Consequently, those providing economic activities not under the control of another are self-employed.[179] In *Lawrie-Blum* the Court provided several indicators as to what constitutes a relationship of subordination. The services Ms Lawrie-Blum provided were performed 'under the direction and supervision of the school'. The school determines the services to be performed and the working hours. Finally, the school's instructions must be carried out and its rules must be observed.[180] As is apparent from the Court's decision and the facts of the *Lawrie-Blum* case, a trainee teacher is thus a worker within the meaning of Article 45 TFEU. In a case concerning the question whether the exception of employment in the public sector applied to employment in the (at that time not privatized) postal service, the Court indicated that the nature of the legal relationship between employer and employee is irrelevant when considering whether a specific situation constitutes an employment relationship within the meaning of Union law. The Court:

> These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of [Union] law.[181]

176 *Lawrie-Blum*, par 16.
177 Article 45 TFEU.
178 *Lawrie-Blum*, par 17; *Trojani*, par 15.
179 *Asscher*, par 25 and 26; *Jany*, par 34.
180 *Lawrie-Blum*, par 18; *Trojani*, par 22, see also par 20, 26 and 29.
181 Case 152/73 *Sotgiu v Deutsche Bundespost* ECLI:EU:C:1974:13, par 5.

Within the limits of the indicators provided by the ECJ, it is up to the national court to determine whether a relationship of subordination exists.[182] As is clear from the *Asscher* case, directors of companies which are the sole shareholders do not provide activities in the context of a relationship of subordination and thus are considered as self-employed persons.[183] In *Jany* the Court provides guidance on the concept of self-employment which lies at the heart of both the freedom of establishment and the freedom to provide services. *Jany* concerned a case of Polish and Czech nationals working as prostitutes in the Netherlands. The here relevant part of the judgment centred on the question whether the relationship between a pimp and a prostitute should be considered an employment relationship. Additional to the definitions which indicate that self-employment is that which does not fall within the definition of employment, the Court provided the following indicators:

> - the activities of the self-employed are outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
> - under that person's own responsibility;
> - in return for remuneration paid to that person directly and in full.[184]

3.3.2.2 Definition of establishment

Similarly to service provision, establishment relates to activities of the self-employed. Consequently, a relationship of subordination forms the distinguishing element with the free movement of workers. The Court provided the following definition of establishment:

> It must be observed in that regard that the concept of establishment within the meaning (...) of the Treaty involves the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period.[185]

The freedom of establishment therefore allows a Union national:

> [T]o participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so con-

182 Case C-337/97 *Meeusen v Hoofddirectie van de Informatie Beheer Groep* ECLI:EU:C:1999:284, par 15; Trojani, par 24.
183 *Asscher*, par 26.
184 *Jany*, par 70.
185 Case C-246/89 *Commission v United Kingdom* ECLI:EU:C:1991:375, par 21; Gebhard, par 25; case C-3/95 *Reisebüro Broede v Gerd Sandker* ECLI:EU:C:1996:487, par 20.

> tributing to economic and social interpenetration within the [Union] in the sphere of activities as self-employed persons (...).[186]

Consequently, the defining criterion separating the freedom of establishment from the free movement of service providers is the participating in the economic life of another Member State on a 'stable and continuous basis'.[187] When services are provided in another Member State on a temporary basis, the free movement of service providers (and receivers) applies.[188] The question then is when an activity is performed on a stable and continuous basis. This has to be determined 'in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity'.[189] The *Schnitzer* case concerned an undertaking providing plastering services in Germany. While having its operating base in Portugal, the Court elaborated on these concepts by indicating that construction services concerning a large building contract can be provided over an extended period, even over several years. In this example, the nature of the service provided, a construction project that by definition will end when the work is finished, is essential, not the duration of the project. The Court also provides the example of a business providing services with 'a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States'.[190] With this argument the Court focuses on the irregularity of service provision which indicates that the company in question does not establish itself in another Member State.

Previously, in the *Gebhard* case, the Court had ruled that an economic activity can be provided on a temporary basis even if the provider of services equips himself with infrastructure in the host Member State, if that infrastructure is required to perform the service. Thus, having an office, chambers or consulting rooms can facilitate temporary service provision without the economic activity leading to establishment in the sense of the Treaty.[191] *In casu* the setting up of chambers in Italy by a German lawyer on a long-term basis, although still practicing in Stuttgart, was held to be establishment.[192] Aided by these guidelines, the question whether self-employed service provision is performed on a temporary basis should be decided by the national court.[193] As will be described below, distinguishing the freedom of establishment from the freedom to provide services is particularly im-

186 *Gebhard*, par 25; *Reisebüro Broede*, par 20.
187 *Reisebüro Broede*, par 20.
188 *Gebhard*, par 21; *Reisebüro Broede*, par 21; *Schnitzer*, par 27.
189 *Gebhard*, par 27.
190 Schnitzer, par 30
191 *Gebhard*, par 27; *Reisebüro Broede*, par 21; *Schnitzer*, par 28.
192 *Gebhard*, par 28.
193 *Reisebüro Broede*, par 22.

portant as a service provider may not be obliged by the host Member State to fulfil the same requirements as companies that are operating from that state.[194]

3.3.2.3 Definition of capital

The original EEC provisions concerning the free movement of capital only applied insofar as restrictions to the free movement of capital needed to be abolished to ensure the proper functioning of the common market. Since the Maastricht Treaty and the renewed impetus for establishing the internal market, this limitation no longer applies.[195] Moreover, the entry into the first stage of the Economic and Monetary Union required Member States to ensure free capital movements.[196] Article 63 TFEU now provides:

> 1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.
> 2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.[197]

The Treaty provisions do not provide a definition of capital, but Directive 88/361 provides a non-exhaustive list which the Court uses as guidance.[198] With the aid of this list the ECJ has classified various cases to be covered by the freedom of movement of capital.[199] Examples of contracts and transactions covered by the freedom of movement of capital are the creation of a mortgage,[200] share dealing and so-called 'golden shares',[201] the acquisition and disposal of property,[202] obtain-

194 This chapter, par 3.5.1.1.
195 Craig and de Búrca 2015, p 722.
196 Barnard 2013, p 580.
197 Article 63 applies to payments between Member States and third countries as well, but this form of movement is limited by Article 64 TFEU. Moreover, Article 66 TFEU contains an emergency clause allowing the Council to take safeguard measures for a period not exceeding six months. Finally, the Lisbon Treaty added a fourth paragraph to Article 65 allowing the Council to rule that restrictive tax measures adopted by Member States concerning third countries can be justified by objectives of the Union if they are compatible with the proper functioning of the internal market, see extensively: J Snell 'Free Movement of Capital: Evolution as a Non-Linear Process' in P Craig and G de Búrca (eds) *The Evolution of EU law* (Oxford University Press, Oxford 2011), chapter 18.
198 Case C-222/97 *Manfred Trummer and Peter Mayer* ECLI:EU:C:1999:143, par 21; Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty OJ (1988) L178/5, p 5.
199 See further: Craig and de Búrca 2015, p 722-723 and Barnard 2013, p 583-584.
200 Case C-464/98 *Westdeutsche Landesbank Girozentrale v Stefan and Republic Österreich* ECLI:EU:C:2001:9.
201 Joined cases C-282/04 and C-283/04 *Commission v Netherlands* ECLI:EU:C:2006:608, par 21; case C-171/08 *Commission v Portugal* ECLI:EU:C:2010:412, par 49. The term golden shares relates to privatization of companies operating in sensitive sectors, where the state holds on to shares in order it to influence the activities of that company, Barnard 2013, p 589.
202 Case C-376/03 *D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* ECLI:EU:C:2005:424, par 24; case C-302/97 *Klaus Konle v Austrian Republic* ECLI:EU:C:1999:271, par 38-39.

ing loans or making investments,[203] inheritances[204] and the granting of credit on a commercial basis.[205] As the list in Directive 88/361 is non-exhaustive transactions not covered by the list can still fall within the scope of Article 63 TFEU.[206]

The relationship between the free movement of capital and the other fundamental freedoms differs from the above described dividing lines between the fundamental freedoms. The Court provided in the *Casati* case that the freedom to move certain types of capital is a precondition to effectively exercise the other freedoms, emphasizing in particular the connection with the right of establishment:[207]

> [F]reedom to move certain types of capital is, in practice, a precondition for the effective exercise of other freedoms guaranteed by the [Treaties], in particular the right of establishment.

As an example, this relationship becomes evident when considering the relationship between shareholders and companies that are constituted in a manner which allows shareholders to definitively influence the decisions the company makes. In such situations, the Treaty provisions relating to the freedom of establishment apply to national restrictions of the free movement of capital.[208] A similar type of relationship exists between free movement of capital and the freedom to provide services. Without free movement of capital liberalizing certain service sectors, such as the banking and insurance sector, is not really conceivable. As described by Barnard, the ECJ approach to Article 63 TFEU has changed over the years. Initially, the Court demonstrates reluctance to an approach applying the Treaty provisions on services simultaneously with the provisions on capital. Recently, the Court applies the above described priority approach: the freedom that is most applicable to the facts of the case forms the basis of the decision.[209] In general, the Court applies the fundamental freedom which takes priority when considering the circumstances of the case. In *Fidium Finanz* the Court offers an explanation specific to the freedom of capital and the other freedoms. The scope of the freedom of capital includes transactions involving third countries, whereas the scope of the other free movement provisions are limited to Member States of the Union. To prevent third-country companies from relying on, in *casu* the freedom to provide services, it is

203 Case C-439/97 *Sandoz GmbH v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland* ECLI:EU:C:1999:499, par 19.
204 Case C-513/03 *Heirs of M.E.A. van Hilten-van der Heijden v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* ECLI:EU:C:2006:131, par 41 and 42.
205 *Fidium Finanz*, par 43.
206 Case C-35/98 *Staatssecretaris van Financiën v B.G.M. Verkooijen* ECLI:EU:C:2000:294; case C-319/02 *Manninen* ECLI:EU:C:2004:4.
207 Case 203/80 *Criminal Proceedings against Guerrino Casati* ECLI:EU:C:1981:261, par 8.
208 Case 231/05 *Oy AA* ECLI:EU:C:2007:439, par 20.
209 *Fidium Finanz*, par 34; Barnard 2013, p 588.

important to clearly separate cases concerning movement of capital from the free movement of service providers.[210]

Barnard provides a useful overview based on several cases which were considered as capital movements. This overview indicates which type of rules fall within the scope of free movement of capital and not within the freedom to provide services:[211] property purchase and investment,[212] currency and other financial transactions,[213] loans,[214] investments in companies especially where the national rule affects those who do not have a dominant interest in the company[215] and golden shares.[216] Finally, Article 63 is applied to taxation measures of certain capital movements, in particular property purchase, investment and charitable gifts.[217]

3.3.3 The freedom to provide services

The overview provided above leads to the following picture. Services within the meaning of Article 56 TFEU are economic activities provided for remuneration by a self-employed person. 'Person' relates to both natural persons and undertakings. Services are provided on a temporary basis and the Treaty provision requires a cross-border element, since Union law in principle does not apply to wholly internal situations. The dividing lines with the other freedoms are constituted by the temporary nature and the self-employed capacity of the service provider. The dividing line with capital is harder to draw but investment, loans and transactions are considered capital movements whereas banks provide financial services. As such, a bank provides mortgage services, but obtaining a mortgage is movement of capital which is required for, as an example, establishment. Upon reading the text of Articles 56-57, the scope of the freedom to provide services seems limited to service providers only. Nevertheless, the right to receive services was codified early on in secondary legislation. Council Directive 73/148/EEC required 'the abolition of restrictions on the movement and residence of nationals of Member States wishing

210 *Fidium Finanz*, par 49.
211 Barnard 2013, p 589.
212 *Konle*, par 39; case C-483/99 *Commission v France* ECLI:EU:C:2002:327, par 38.
213 Case C-364/01 *The heirs of H. Barbier v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen* ECLI:EU:C:2003:665, par 63.
214 Case C-478/98 *Commission v Belgium* ECLI:EU:C:2000:497.
215 Case C-531/06 *Commission v Italian Republic* ECLI:EU:C:2009:315, par 47 and 48.
216 Case C-367/98 *Germany v Parliament and Council* ECLI:EU:C:2002:326; case *Commission v France* (C-483/99), par 41. Golden shares usually involve newly privatized companies in sensitive sectors, such as energy, where the state's golden share enables it to retain a degree of influence over the activities of the company. The Court applied the provisions concerning establishment and capital simultaneously in: case C-326/07 *Commission v Italy* ECLI:EU:C:2009:193, par 38.
217 Barnard 2013, p 589.

to go to another Member State as recipients of services'.[218] The ECJ confirmed the movement rights for service receivers in *Luisi and Carbone*.[219]

Due to the special nature of services trade,[220] the interstate element required for the application of Article 56 TFEU can be triggered in three different manners. As is clear from the Treaty provision itself, service providers can travel to another Member State to provide their services.[221] The right to provide a service on the territory of a Member State other than the state where the provider is established applies irrespective of the question where the service receiver is established. Thus Article 56 TFEU includes situations where both the service provider and receiver have travelled to another Member State.[222] Service receivers travelling to a service provider in another Member State also fall within the scope of Article 56.[223] In *Cowan* a British tourist could rely on Article 56 even though the exact service that he had received remained unclear.[224] The third option is that neither the service provider nor the service receiver travel to another Member State. Instead it is the service itself that moves across borders, for instance by telephone, or through Electronic Service Delivery.[225]

In several cases, the ECJ was confronted with certain sensitive service sectors such as gambling, abortion and prostitution. The outer limit of such sectors can be found in relation to illegal activities. In respect to illegal products the Court has clarified that these do not fall within the free movement of goods.[226] By analogy, it is safe to presume that a murder contract will not fall within the scope of the freedom to provide services. However, the difficulties begin where services are deemed immoral and are prohibited in one Member State, whereas they are allowed in another Member State. The Court devised a solution by allowing Member States to decide whether they want to regulate or prohibit such services, but only in a proportional manner and without arbitrary discrimination. In other words, if a Member State allows its own nationals (or residents) to perform economic activities, such as prostitution, a Member State may not prohibit this activity in relation to

218 Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services OJ (1973) L172/14, Article 1(1) under b; this Directive was repealed by Directive 2004/38/EC.

219 Joined Cases 286/82 and 26/83 *Luisi and Carbone v Ministero del Tesoro* ECLI:EU:C:1984:35, par 10; case 186/87 *Ian William Cowan v Trésor public* ECLI:EU:C:1989:47, par 15 and 17.

220 Services can be provided without the receiver and the supplier being at the same location. Note that this can also apply to the freedom of movement of workers (in the form of posting) and to the freedom of capital (online transactions).

221 As was the case in case C-281/06 *Hans-Dieter Jundt and Herwig Jundt v Finanzamt Offenburg* ECLI:EU:C:2007:816, where a German resident provided spare-time lecturing services at a university in Strasbourg (France).

222 Case C-154/89 *Commission v France* ECLI:EU:C:1991:76, par 9 and 10; case C-180/89 *Commission v Italy* ECLI:EU:C:1991:78, par 8 and 9.

223 *Luisi and Carbone*, par 16.

224 *Cowan*, par 15 and 17.

225 Prime examples are *Bond van Adverteerders v Netherlands* and *Alpine Investments*. ESD is the general term reserved for service provided over the internet and similar methods.

226 Case 294/82 *Einberger v Hauptzollamt Freiburg* ECLI:EU:C:1984:81.

nationals (or residents) of another Member State.[227] The same holds true for gambling[228] and abortion.[229] In addition, fundamental rights can provide a limitation as well. In the *Omega* case the service of providing laser games (simulating killing of human beings) could be limited on the basis of the right to human dignity.[230] The recent *Josemans* case, concerning the prohibition of allowing non-nationals entry to Dutch cafés selling marijuana, does not alter this line of jurisprudence. The Court essentially indicated that marijuana is considered illegal in all Member States, including the Netherlands.[231] However, despite the illegality, the Netherlands has an official policy of tolerance. The Court therefore found the selling of marijuana to fall outside the scope of the free movement of goods. Nevertheless, refusing non-nationals entry to such cafés did constitute a restriction of the freedom of service providers as these cafés also sold drinks. The prohibition was nevertheless justified on the ground of public order, namely to combat drug tourism.[232]

A final, particularly thorny issue relating to the scope of the free movement of service providers remains. Service providers are allowed to use their own employees to provide a service in another Member State. These employees are referred to as posted workers and the ECJ has classified such situations under the heading of service provision. However, there is a very thin line between the posting of workers and the hiring-out of personnel. Hiring-out personnel is a service in which the service provider delivers workers to another person in order to carry out an economic activity under the guidance of that other person. Posting of workers falls within the scope of the freedom to provide services, while hiring-out falls within the free movement of workers. In principal posting is governed by the social policy of the home Member State, whereas hiring-out is governed by the social policy of the host Member State. As it is complicated to draw a clear line between the two, this has become a sensitive issue of Union law.[233]

227 *Adoui and Cornuaille*, par 61; *Jany*, par 56-59.
228 *Schindler*, par 32.
229 Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* ECLI:EU:C:1991:378, par 20.
230 *Omega*, par 35.
231 Case C-137/09 *Marc Michel Josemans v Burgemeester van Maastricht* ECLI:EU:C:2010:774, par 36 and 77.
232 *Josemans*, par 82-83.
233 This matter will be discussed in this chapter, par 3.4.2.

3.4 Categories of persons enjoying the freedom to provide services

The general scope of the freedom to provide services is limited to Union nationals.[234] From the outset the Treaty provisions concerning services contained a mandate to extend the content of the services Chapter to third-country nationals established within the Union.[235] The Commission has made two attempts at legislative proposals towards that end, both of which were not supported by the Council.[236] Consequently, and as explicitly indicated by the ECJ, the Treaty 'does not extend the benefits of those provisions to providers of services who are nationals of non-member countries, even if they are established within the [Union] and an intra-[Union] provision of services is concerned'.[237] Several exceptions to this general rule apply. Certain categories of third-country nationals enjoy derived free movement rights from an EU person. Firstly, certain close family members and members of the household of EU citizens have the right to accompany their EU citizen family member to a host Member State in order to reside and take up self-employment there. As the EEA Member States are part of the internal market, EEA nationals have similar rights, as do the family members of EEA nationals. Secondly, employees of service providers have derived rights of movement and residence to enable the service provider to post its workers in the host Member State where the service contract is to be performed. A different issue, which is however closely related to the topic of the posting of workers, is the transitional restriction relating to the free movement of workers that applies to citizens of 'recently' acceded Member States. These transitional measures do not apply to citizens that provide self-employed activities in the Netherlands and the United Kingdom. This category of EU citizens is therefore placed in a different position than other Union citizens as it is necessary to distinguish employed from self-employed activities to determine whether such citizens may rely on free movement. Croatian nationals face such restrictions and it is likely that in cases of new enlargement rounds the movement rights of citizens of these new Member States will be limited by similar restrictions. In this study citizens facing such restrictions will be referred to as transition citizens. Finally, Turkish nationals can rely on the EEC – Turkey Associ-

234 'Nationals' refers to both natural persons and companies which have their seat in a Member State, see this chapter, par 3.3.1.1.

235 Article 59(2) EEC (56 TFEU).

236 E Guild 'Primary Immigration: The Great Myths' in E Guild and C Harlow (eds) *Implementing Amsterdam, Immigration and Asylum Rights in EC Law* (Hart Publishing, Oxford 2001), p 86. The first attempt consisted of two proposals: Commission proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services and Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community COM (1999) 3, final. The second attempt was included in the original Services Directive proposal, COM (2004) 2, final, see further this chapter, par 3.5.3.3.

237 Case C-290/04 *FKP Scorpio Konzertproduktionen GmbH v Finanzamt Hamburg-Eimsbüttel* ECLI:EU:C:2006:630, par 67-69.

ation Agreement in relation to the free movement of service providers. An Additional Protocol attached to the Association Agreement with Turkey contains a standstill clause which has consequences for the restrictions that Member States may impose on Turkish service providers.

3.4.1 EU citizens, EEA nationals and family members

Nationals of the Member States are the prime beneficiaries of the fundamental freedoms. Whether someone is a national is a matter of national law, however, nationals of a Member are automatically citizens of the Union.[238] Union citizens enjoy the full effect of Article 56 TFEU and this category is extended with nationals of countries participating in the Agreement on the European Economic Area.[239] The objective of the EEA was to ensure 'equal treatment and non-discrimination of individuals and economic operators' in all the EEA states regarding the specific areas covered by the agreement.[240] The EEA thus primarily ensures the four freedoms and equal competition within its territory. The main objective to extend the EU internal market to EEA countries is flanked with several policies such as those concerning research and development, education and consumer protection.[241] Besides this much more modest scope, the EEA Agreement differs from Union law in relation to the supranational integration of Union law. Thus EFTA-EEA States retain more of their independent sovereignty and their legal autonomy.[242] Nevertheless, from the perspective of free movement of service providers, the EEA Agreement ensures the homogeneity of the rules.[243] For the purposes of this chapter what matters is that EFTA-EEA nationals are in a similar position as EU nationals. The homogeneous interpretation of EEA and corresponding Union rules was an important aspect for the participating EFTA states, as well as for the Union Member States.[244] For the EU a prime motivator for homogeneous interpretation was the avoidance of two distinct set of rules which would confuse its legal system. For the EFTA states the synchronising of the rules avoids discrimination of EFTA nation-

238 Article 20(1) TFEU.
239 Agreement on the European Economic Area OJ (1994) L1/3. See specifically, Article 36-39.
240 S Norberg 'The Institutional set up of the EEA Agreement' in J Stuyck and A Looijestijn-Clearie (eds) *The European Economic Area EC-EFTA* (Kluwer, Deventer 1994), p 14-15.
241 L Gormley 'The European Economic Area and the Europe Agreements' in J Stuyck and A Looijestijn-Clearie (eds) *The European Economic Area EC-EFTA* (Kluwer, Deventer 1994), p 4; M Elvira Méndez-Pinedo *EC and EEA Law. A Comparative Study of the Effectiveness of European Law* (Europa Law Publishing, Groningen 2009), p 31.
242 See for an overview: Elvira Méndez-Pinedo 2009, p 31-32.
243 Elvira Méndez-Pinedo 2009, p 32.
244 Norberg 1994, p 15.

als compared to EU nationals operating within the EEA.[245] The objective of homogeneity is apparent from several paragraphs of the EEA Agreement.[246]

The EEA consists of the 28 EU Member States, and three of four participants to the European Free Trade Agreement (EFTA), Norway, Iceland and Liechtenstein.[247] As such, free movement of service providers applies to nationals of the EEA countries. The corollary of these economic rights, entry and residence rights, apply to these nationals as well. Though Switzerland is part of the EFTA Agreement, and formally signed the EEA in 1992, the Swiss population rejected the EEA agreement via referendum in the same year. Consequently, Switzerland does not participate in the same manner to the internal market of the EU. Based on the Agreement on the free movement of persons between the EU and Switzerland of 2002, and various sectoral agreements, Swiss nationals do have rights of entry to, and residence and the right to perform economic activities on the territory of the EU Member States.[248] However, Swiss nationals enjoy a limited right of service provision as they are only allowed to provide services on the territory of the EU Member States for 90 days per calendar year, or upon receiving authorization from the relevant authorities of the contracting party concerned.[249]

Directive 2004/38/EC codifies the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.[250] As such, the directive provides an overview of which members of the family enjoy a derived right to free movement from their EU family member. Moreover, as EEA nationals and Swiss nationals are in a comparable position, their family members enjoy a derived right to free movement as well. The Directive includes the following family members for the purposes of these rights:[251]

- The spouse or the partner with whom the Union citizen has contracted a registered partnership;[252]
- Direct descendants who are under the age of 21 or are dependants and those of the spouse or partner;
- Dependent direct relatives in the ascending line and those of the spouse or partner.

245 Norberg 1994, p 15. Problems regarding differing interpretations which arose from a first draft of the EEA Agreement were identified by the ECJ in Opinion 1/91 ECLI:EU:C:1991:490; see also case 270/80 *Polydor Limited and RSO Records Inc. v Harlequin Record Shops Limited and Simons Records Limited* ECLI:EU:C:1982:43.

246 See for example: EEA Agreement, preamble, par 4 and 1 and Article 105 and 106; Norberg 1994, p 17.

247 Elvira Méndez-Pinedo 2009, p 30-31. See for general information concerning the EFTA: <http://www.efta.int/eea/eea-agreement.aspx> (last visited 1 October 2015).

248 Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons OJ (2002) L114/6.

249 EC – Swiss Confederation Agreement, Article 5.

250 Directive 2004/38/EC fully applies to EU, EEA and Swiss nationals and their families, see for an overview of that Directive, this chapter, par 3.5.1.3.

251 Article 2(2) Directive 2004/38/EC.

252 This is conditional on the registered partnership being based on the legislation of a Member State and on recognition of registered partnerships as equivalent to marriage in the host Member State, Directive 2004/38/EC, Article 2(2)(b).

Furthermore, Article 3 provides that:

> Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons:
> (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;
> (b) the partner with whom the Union citizen has a durable relationship, duly attested.
> The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people.

Nationals of EEA Countries and Swiss nationals enjoy free movement rights in the same manner as EU nationals.[253] The same holds true for the specified accompanying family members of EU, EEA or Swiss nationals. However, family members enjoy the right to take up an economic activity in the host state, but not in any other Member state.[254] Therefore, this derived right is granted to included family members, irrespective of their nationality,[255] but only when they are accompanying their EU family member.[256]

3.4.2 Posted workers, third-country nationals and transition citizens

In a string of cases, starting with the *Rush Portuguesa* judgment, the ECJ has established the right for businesses to use their own labour force, including third-country nationals and transition citizens, to another Member State in order to provide services.[257] To effectively utilize their economic rights, employers must, under certain conditions, be allowed to post their employees on the territory of the Member State where they provide their service.[258] *Rush Portuguesa* is seen as the basis

253 Directive 2004/38/EC, Article 24(1); thus the same justifications to refuse these rights apply, see this chapter, par 3.5.1.3.
254 Case C-10/05 *Cynthia Mattern and Hajrudin Cikotic v Ministre du Travail et de l'Emploi* ECLI:EU:C:2006:220, par 27.
255 Case 131/85 *Gül v Regierungspräsident Düsseldorf* ECLI:EU:C:1986:200.
256 Barnard 2013, p 470-471.
257 *Rush Portuguesa* and case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* ECLI:EU:C:1994:310.
258 This right is for example conditional on the third-country national being a legal resident in the territory of the Member State where his employer is established.

for this line of cases leading to mobility for posted workers. A similar type of argumentation can already be found in the *Seco* case which concerned the posting of third-country national workers by two French companies in Luxembourg. Luxembourg legislation in general required employers to contribute to social security schemes, though the workers in question were already compulsory affiliated to the French social security scheme. The Court indicated that:

> in such a case the legislation of the State in which the service is provided proves in economic terms to be more onerous for employers established in another Member State, who in fact have to bear a heavier burden than those established within the national territory.[259]

The Luxembourg authorities claimed that since a Member State is allowed to restrict access for third-country nationals to their territory, it should be allowed to attach to any work permit, conditions or restrictions such as the compulsory payment in question. The Court rejected the argument:

> A Member State's power to control the employment of nationals from a non-Member country may not be used in order to impose a discriminatory burden on an undertaking from another Member State enjoying the freedom (...) to provide services.[260]

The Luxembourg authorities further indicated that these compulsory contributions were intended to offset the economic advantages which undertakings may have gained by not complying with host state legislation, in particular those relating to minimum wages. Again the Court rejected the argument, indicating that Union law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established.[261]

Seco touched upon, but did not concern restricting access to the territory or employment in cases where service providers bring their own employees. In *Rush Portuguesa* this issue lies at the heart of the matter. The case concerned a construction and public works undertaking established in Portugal that obtained a subcontract with a French undertaking for the carrying out of works on the construction of a railway line in France. The Portuguese undertaking brought its own workforce consisting of Portuguese nationals. The facts of the case took place after Portugal's

259 Joined cases 62/81 and 63/81 *Société anonyme de droit français Seco et Société anonyme de droit français Desquenne & Giral v Etablissement d'assurance contre la vieillesse et l'invalidité* ECLI:EU:C:1982:34, par 9.
260 *Seco*, par 11-12
261 *Seco*, par 13-14.

accession to the European Union but before the end of the transition period during which the free movement of workers did not apply to Portuguese nationals. Consequently, the Portuguese nationals were at the time of the case transition citizens. The freedom to provide services did apply between Portugal and the other Member States from the date of accession.[262] Consequently, this case raised the problem of the dividing line between the freedom to provide services, and the freedom of movement for workers. The ECJ ruled that this situation is covered by the freedom to provide services, grounding its decision on two important arguments. The first argument of the Court was that the freedom to provide services, as provided by the Treaty entails

> that the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided 'under the same conditions as are imposed by that State on its own nationals'.[263]

This means that Member States are precluded

> from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement *in situ* or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.[264]

The second argument used by the Court was that the posting of workers does not involve access to the labour market of the host Member State. The Court indicated that: 'such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State'.[265] According to the Court, the concept of service provision, as defined by Article 57 TFEU, covers different activities. The Court continued by exempting services involving the making available of labour, as such activities are intended to enable workers to gain access to the labour market of the host Member State.[266]

262 *Rush Portuguesa*, par 7-9; case C-113/89 *Rush Portuguesa Lda mot. Office national d'immigration* Opinion AG van Gerven ECLI:EU:C:1990:107, par 2.
263 *Rush Portuguesa*, par 11.
264 *Rush Portuguesa*, par 11.
265 *Rush Portuguesa*, par 15.
266 *Rush Portuguesa*, par 16.

Thus, the conclusions drawn in *Rush Portuguesa* were not applicable to all cases involving service provision.[267] The limitation of the *Rush Portuguesa* case has now been clarified, and only seems to relate to the hiring-out of transition citizens.[268] The Court's ruling indicates that a service provider and its staff enjoy free movement for the duration of the works in question. Restrictions such as work permits and the obligation to recruit employees in the host state are prohibited. However, the ECJ does recognize the right of host Member States to check whether the freedom to provide services is not used for another purpose, for instance the placing or making available of workers. Yet these checks must

> observe the limits imposed by Union law and in particular those stemming from the freedom to provide services which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities.[269]

Finally, the ECJ addressed expressed fears over social dumping by indicating that Member States can apply their legislation, or collective labour agreements, to persons employed on their territory, including posted workers temporarily present on their territory.[270]

Rush Portuguesa concerned nationals of a Member State who did not yet enjoy free movement of workers due to the temporary restriction of the free movement of workers. In the *Vander Elst* case, the ECJ reached a similar decision regarding work permit requirements relating to the posting of third-country national employees. Vander Elst operated a demolition work business established in Belgium. His company carried out a one month contract in France through the posting of eight of its regular employees. Four of these employees were of Moroccan nationality legally residing in Belgium and holding Belgian work permits. Vander Elst had obtained short-stay visas for the Moroccan employees, who were therefore legally residing in France.[271] However, French legislation required employers to obtain a French work permit in relation to third-country nationals, for which a fee was due. This obligation was enforced by a heavy administrative fine in cases of non-compliance.[272] The ECJ reiterated the arguments used earlier in the *Rush Portuguesa* case, elaborating on its non-discrimination argument. It should be pointed

267 As specifically pointed out by AG Bot, joined cases C-307/09, C-308/09 and C-309/09 *Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo and Olbek Industrial Services sp. zoo v Minister van Sociale Zaken en Werkgelegenheid Opinion AG Bot* ECLI:EU:C:2010:510, par 39-41.

268 This is clear from the *Vicoplus* and *Essent* cases: joined cases C-307/09, C-308/09 and C-309/09 *Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo and Olbek Industrial Services sp. zoo v Minister van Sociale Zaken en Werkgelegenheid* ECLI:EU:C:2011:64; case C-91/13 *Essent Energie Productie BV v Minister van Sociale Zaken en Werkgelegenheid* ECLI:EU:C:2014:2206. This matter will be discussed below in this paragraph.

269 *Rush Portuguesa*, par 17.

270 *Rush Portuguesa*, par 18; social dumping is discussed in chapter 4, par 4.3.4.

271 *Vander Elst*, par 19.

272 *Vander Elst*, par 3-4 and 11.

out that at the time the Court dealt with this case it had firmly adopted its market access rhetoric.[273] Consequently, in *Vander Elst* the Court phrased the argument in terms of Article 56 TFEU requiring the abolition of:

> any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (...).[274]

The Court emphasized that measures subjecting service provision to an administrative licence system or fees already imposed in the host Member State restrict the freedom to provide services. In line with the *Säger* approach, such restrictions require justification by overriding reasons relating to the general interest. Moreover, such measures may only be imposed insofar as that interest is not safeguarded by the home state.[275] The French measures overlapped with protection already provided in the home state as the Moroccan workers were legal residents in possession of work permits in Belgium. As such, the Court cited earlier case law indicating that:

> (...) a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions whose object is to guarantee the freedom to provide services (...).[276]

The Court reaffirmed that this does not preclude the host state from applying its legislation or collective labour agreements to persons employed on its territory. However, the Court's rhetoric in *Vander Elst* is limited to legislation or collective agreements of public policy, such as minimum wages, whereas in *Rush Portuguesa* no such limitation was included. The initial *Seco* case and cases subsequent to *Vander Elst* all contain the limited phrasing of the argument; Member States may still apply 'their legislation or collective labour agreements entered into by both sides of industry *relating to minimum wages* (emphasis added)'.[277] As these rules

273 Discussed in this chapter, par 3.5.1.1.

274 *Vander Elst*, par 14, referring to *Säger*, par 12.

275 *Vander Elst*, par 15-16; see also joined cases 62/81 and 63/81 *Seco*, par 9 and case C-198/89 *Commission v Greece* (tourist guides) ECLI:EU:C:1991:79, par 18-19.

276 *Vander Elst*, par 17; case C-154/89 *Commission v France* ECLI:EU:C:1991:76, par 12; *Säger*, par 13.

277 Emphasis added. Verschueren 2007, p 79; In *Rush Portuguesa* the 'relating to minimum wages' part of the sentence is missing, *Rush Portuguesa*, par 18. In subsequent cases, *Vander Elst* and *Giuot*, the Court repeats the phrase in *Seco: Vander Elst*, par 23 and case C-272/94 *Criminal proceedings against Michel Guiot and Climatec SA, as employer liable at civil law* ECLI:EU:C:1996:147, par 12; case C-164/99 *Portugaia Construções Lda* ECLI:EU:C:2002:40, par 21; joined cases C-369/96 and C-376/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL* ECLI:EU:C:1999:575, par 33; case C-165/98 *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL* ECLI:EU:C:2001:162, par 22.

form restrictions to the freedom to provide services, they can only be applied if they are suitable to achieve the aim of the objective which they pursue, the protection of workers, and if they do not go beyond what is necessary to achieve that aim.[278] Houwerzijl points out that this narrows the Court's ruling in *Rush Portuguesa*, and this narrowing was adopted in Directive 96/71/EC, the secondary legislation that was adopted to regulate the subject of cross-border posting. The limitation is part of that directive as it only concerns the possibility to apply legislation and collective agreements to the terms and conditions listed in Article 1(3).[279]

Mobility rights for a posted worker are derived from a business's right to provide services and thus should not be seen as directly establishing movement rights for third-country nationals. The rationale that led the Court to this decision is that, in order to compete under the same conditions as imposed on national service providers, foreign (EU established) service providers must be allowed to move staff to another Member State in order to provide services. This entails that making the movement of staff subject to restrictions such as conditions as to engagement *in situ* or an obligation to obtain a work permit, would discriminate against the foreign service supplier, as its competitors in the host country are able to use their staff without restrictions.[280] According to the Court, Article 56 TFEU requires that a Member State does not make the provisions of services on its territory conditional upon observance of all the conditions required for establishment, since the freedom to provide services would otherwise be deprived of all practical effectiveness. In general terms, this principle applies to any authorization which makes the provision of services conditional upon the issuing of an administrative authorization, unless it is objectively justified.[281] A Member State cannot therefore assess the posting as a function of the conditions applying to employment with an employer established in that Member State and, hence, cannot insist on a work permit granting access to employment. The same applies to the conditions of entry (visa) and residence for the persons concerned, since these are indispensable for the freedom to provide services. This freedom specifies an outcome: the measures taken at national and Union level to achieve it, including those relating to diplomas and professional qualifications, must promote the achievement of that freedom and not make it conditional upon other factors, a rule provided in cases such as *Vlassopoulou*.[282] The conditions governing posting remain governed by the freedom to provide services of the service provider. The question whether the posted worker concerned falls within the scope of Article 45 TFEU is therefore irrelevant.

278 *Arblade*, par 35 and case C-341/02 *Commission v Germany* ECLI:EU:C:2005:220, par 24.
279 Houwerzijl 2005, p 77; Verschueren 2007, p 88.
280 *Rush Portuguesa*, par 11-12.
281 This chapter, par 3.5.2.
282 Case C-340/89 *Irène Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* ECLI:EU:C:1991:193, par 15, 19 and 23; see further this chapter, par 3.5.1.

As service provision normally is based on the principle of home state control, Directive 96/71/EC was specifically adopted to regulate which terms and conditions of employment host Member States must apply to workers posted on their territory.[283] Conditions applied by the host Member State falling outside this so-called nucleus of mandatory rules are rarely in conformity with the free movement of service providers. This has become apparent from several infringement procedures initiated by the Commission against Member States applying measures to control the posting of workers where the employee concerned is a third-country national. These measures and the justification as forwarded by the Member States can be summarised as follows:[284]

- requirement of a work permit, or a specific posting visa to be obtained prior to arrival (ensuring job priority for EU national workers; compliance with social welfare rules, minimum wages, working conditions, and the duration of contracts);
- employment contract conditions, indefinite duration and in existence for certain amount of time before the employees are posted (necessary to protect the labour market, by ensuring that the employee has lawful and regular employment and a stable link with the Member State of origin and the company reducing risks of exploitation; needed to avoid social dumping and to ensure return of the employee);
- requirement of a residence permit (needed to control the movement of aliens);
- passport valid during the period of residence;
- information concerning the dates of beginning and ending of the posting, information concerning the business, its clients, identities of employees, and remuneration;
- evidence that wage and employment conditions, social security provision, and affiliation to social security schemes covering sickness and accidents are met for duration of posting (preventing social dumping);
- bank guarantees to cover the cost of repatriation at the end of the contract (providing security for employees).

Guild indicates that the motivations for such measures roughly fit into two categories: the risk of abuse of service provision to gain access to the labour market for third-country nationals and the risk of exploitation of the employees who are

283 Directive 96/71/EC, discussed in this chapter, par 3.5.3.1.

284 Case C-445/03 *Commission v Luxembourg* ECLI:EU:C:2004:655; case C-244/04 *Commission v Germany* ECLI:EU:C:2006:49; case C-168/04 *Commission v Austria* ECLI:EU:C:2006:595. Summarised in E Guild 'Mode 4 and the EU: EU Free Movement of Services and Member State Powers on Immigration' (2008) Quaker United Nations Office Programme on Labour Mobility Briefing Paper, par 5-7. Several of these case are extensively discussed in Tans 2008.

posted.[285] While the ECJ recognized the validity of the objectives concerned, it ruled that none of these measures were proportionate to the aim they sought to ensure. In particular the ECJ indicated that concerns regarding the enforcement of labour protection rules could be met by requiring simple declarations from the employer. Similar, the conditions attached to the employment contract were found to be excessive for the protection of social welfare. In particular, these measures form an obstacle for sectors where the service needs to be provided in a limited timeframe.[286] As was the case in the original *Rush Portuguesa* and *Vander Elst* judgments, in these infringement cases the Court stressed that posted employees do not gain access to the labour market of the host State, as they return to the country of origin when the service provision is completed. While legitimate control to prevent entry to the national labour market is allowed, this control should not render illusory the right to provide services which may not be made subject to the discretion of national authorities.[287]

Posting and hiring-out

In 1981, the ECJ provided its ruling in the *Webb* case concerning a UK based company providing technical staff to businesses in the Netherlands. Dutch legislation made the provision of manpower subject to a system of licensing intended to protect the Dutch labour market.[288] The Court was asked to determine whether, this activity, the hiring-out of personnel, should be considered as the provision of a service. The Court ruled that a company making its workforce available for another company, for remuneration and without an employment contract being concluded with the user of that workforce, provides a service within the within the meaning of Article 56 TFEU.[289] The Court recognized that providing manpower may have an impact on the labour market of the host Member State. Therefore, the employees that are provided may, in certain circumstances, be covered by the provisions relating to the free movement of workers and the regulations implementing these provisions.[290] The provision of manpower is a particularly sensitive matter from the occupational and social point of view. Owing to the special nature of the employment relationships inherent in that kind of activity, pursuit of such a business directly affects both relations on the labour market and the lawful interests of the workforce concerned.[291]

285 Guild 2008, p 8. Immigration concerns could be added as well, however these in part relate to the same concerns insofar as they do not address national security.
286 *Commission v Germany* (C-244/04), par 35.
287 *Commission v Luxembourg* (C-445/03), par 38.
288 Case 279/80 *Criminal proceedings against Alfred John Webb* ECLI:EU:C:1981:314, par 3 and 5.
289 Webb, par 9; Essent, par 39 and 54; Vicoplus, par 27; case C-298/09 *RANI Slovakia s. r. o. v Hankook Tire Magyarország kft* ECLI:EU:C:2010:343, par 36.
290 *Webb*, par 10 and 18; Vicoplus, par 28.
291 *Webb*, par 18.

As noted by Tjebbes, this blurring of the line between the free movement of workers on the one hand, and the freedom to provide services on the other, is in contrast with the closed system of Union law. A Union citizen who moves to another Member State to pursue an economic activity is governed by either the free movement of workers, the freedom of establishment or the freedom of movement to provide services.[292] As such, these fundamental freedoms are mutually exclusive in relation to free movement rights.[293] Houwerzijl notes that classifying the activity of providing manpower as service provision does not entail that the provided employees similarly fall within the scope of the free movement of services.[294] The Court distinguishes between the service activity itself, the supply of manpower, and the employees of the supplying agency who may under certain circumstances be covered by the provisions on free movement of workers and the secondary legislation adopted for the implementation thereof. That does not prevent undertakings of that nature which employ such workers from being undertakings engaged in the provision of services.[295]

In any case, as providing manpower to companies in other Member States has a possible effect on the labour market of that state, the Court does attach consequences on this type of service provision that are similar to those applied to the free movement of workers. Nevertheless, the activity itself is a service activity. As such, the Court has drawn a distinction between posting of workers 'being ancillary to a provision of services and the actual purpose of the provision of services being to enable workers to gain access to the labour market of the host Member State.'[296] The ECJ provided guidance concerning the regulation of the service activity of hiring-out workers in the *Vicoplus* case. Based on the *Webb* ruling, Member States were allowed to regulate the hiring-out of workers through a licensing system.[297] In contrast, as described above, the measures that Member States are allowed to impose in situations concerning the posting of workers are very limited. Therefore, it is important to distinguish cases concerning the posting of workers on the one hand, and cases concerning hiring-out of workers on the other. The means to make this distinction have to a certain extent been provided by the Court in *Vicoplus*. The joined cases *Vicoplus*, *BAM Vermeer* and *Olbek* all concerned companies which had received fines imposed for employing Polish workers in the Netherlands without a work permit. The inspections by the Dutch labour inspectorate, which formed the basis of the decision to impose these fines, were per-

292 Note that free movement also applies to job seekers, see Directive 2004/38, Article 14(4)b.

293 M Tjebbes 'Noot HvJEU, C-307/09, C-308/09, C-309/09 (Vicoplus e.a.)' (2011) 172 *Jurisprudentie Vreemdelingenrecht*, par 6; case *Gebhard*, par 20.

294 Houwerzijl 2005, p 44.

295 *Webb*, par 10; similarly Martin, who refers to this paragraph of the *Webb* judgment as expressly affirming that posted workers are workers in the sense of the Treaty provisions, D Martin 'Comments on Florus Ariël Wijsenbeek and Arblade' (2000) 2 *European Journal of Migration and Law*, p 105.

296 As indicated by AG Bot, Vicoplus Opinion AG Bot, par 41.

297 *Webb*, par 18-20.

formed during the transitional regime adopted by the Netherlands providing temporary restrictions on the free movement of workers from the EU-8 Member States.[298] These cases therefore concerned transition citizens. As a consequence, until the end of the transitional period (for EU-8 citizens, 1 May 2007) the Netherlands was allowed to require employees of EU-8 nationals to obtain a work permit. The ECJ formulated the transitional measures as a justification of national legislation, which in itself is incompatible with Articles 56 TFEU and 57 TFEU.[299] Importantly, this is different from indicating that the transitional measures apply to this case. The Court clearly determined that the companies in the *Vicoplus* case are providing services, rendering the transitional measures themselves (suspending the freedom of movement for workers) inapplicable to the case.[300]

The cases revolved around the question whether the Polish workers in question should be seen as employees provided by the Polish companies in question (hiring-out) or whether they were employees posted by their Polish employers to fulfil a service contract in the Netherlands (posting). The Court ruled that the making available of labour, though a service activity, is intended to enable workers to gain access to the labour market of the host Member State.[301] On that basis, the Court concluded in *Vicoplus* that the Dutch legislation requiring a work permit for personnel that is hired-out to Dutch undertakings, as defined in Article 1(3)(c) Directive 96/71/EC, is a measure regulating access of Polish nationals to the labour market which constitutes a transitional measure within the meaning of the Act of Accession 2003. The Court concluded that these measures are therefore compatible with the provisions concerning the freedom to provide services.[302] The Court explained its decision on the basis of the argument that hiring-out services influence the labour market. The transitional measures are intended to prevent disturbances to the labour market due to 'the immediate arrival of a large number of workers who are nationals of those new States'.[303] Therefore, it is not the classification of the activity as either a service activity or as the movement of workers, but

298 Act of Accession concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union OJ (2003) L236/46. Article 24 of the Accession Treaty refers to the measures contained in the Annexes to the Treaty. These Annexes contain the transitional measures relating to the free movement of workers for each acceding State separately (Annexes V to XIV). Note that for Cyprus and Malta (Annexes VIII and XI) no transitional measures were adopted (though for Malta a safeguard clause was included). As a consequence nationals of these new Member States enjoyed free movement of workers from the outset. Consequently, to indicate the 2004 Member States for which transitional measures were adopted the term EU-8 is often used.

299 *Vicoplus*, par 23-24; the ECJ applied the Act of Accession in a similar fashion in relation to the free movement of goods, see case C-140/05 *Amalia Valeško v Zollamt Klagenfurt* ECLI:EU:C:2006:647, par 74.

300 *Vicoplus* par 27.

301 *Vicoplus*, par 29; *Rush Portuguesa*, par 16.

302 *Vicoplus*, par 32-33.

303 *Vicoplus*, par 34-37; case 9/88 *Mário Lopes da Veiga v Staatssecretaris van Justitie* ECLI:EU:C:1989:346, par 10; *Rush Portuguesa*, par 13.

rather the effect the activity has that determines whether the measure falls within the transitional regime adopted in the Act of Accession.

The Court continued with the question how to distinguish between the making available of labour services or situations involving the posting of workers to perform a service contract. The difference between the two activities is that hiring-out services deliver personnel to the service receiver to perform a certain activity. Cases concerning posting of workers are different as the service receiver is not performing an activity and is merely receiving a service. Therefore, in the scenario of posting the Court concluded that no job was created in the first place, which means that posting has no impact on the national labour market.[304] The Court then provided three criteria to establish whether a case concerns the hiring-out of workers. Hiring-out is:

> 1 – 'a service provided for remuneration, within the meaning of the first paragraph of Article 57 TFEU, in respect of which the worker made available remains in the employ of the person providing the service, no contract of employment being entered into with the user';[305]
>
> 2 – in the case of hiring-out 'the movement of workers to another Member State constitutes the very purpose of a transnational provision of services.' The contrast with the posting of workers is that posting is 'ancillary to a provision of services undertaken by that employer' in the host Member State;[306]
>
> 3 – 'a worker who is hired-out, within the meaning of article 1(3)(c) of Directive 96/71, works under the control and direction of the user undertaking.' Contrary, in the scenario of Article 1(3)(a) the worker remains under the control and direction of the company posting the worker.[307]

In *FNV Kunsten* the Court emphasized that a service provider can lose his status of an independent trader if he does not determine independently his own conduct in the market, if he does not bear the financial or commercial risks and operates as an auxiliary within the principal's undertaking. The Court continues by expressly

304 *Vicoplus*, par 31 and 51.

305 *Vicoplus*, par 43.

306 *Vicoplus*, par 45-46; see also: *Vicoplus* Opinion AG Bot, par 65, *Rush Portuguesa*, par 15 and Directive 96/71/EC, Article 1(3)(a).

307 *Vicoplus*, par 47. As explained by AG Bot, this can be derived from the fact that Article 1(3)(a) does indicate that the direction over the worker remains in the hands of the undertaking providing the service. The lack of this statement in Article 1(3)(c) indicates that the user undertaking gains direction over the worker, *Vicoplus* Opinion AG Bot, par 62. See also Article 1(2) of Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship OJ (1991) L206/19. That provision provides that 'an employee of a temporary employment business is assigned to work for an under the control of an undertaking and/or establishment making use of his services'. *Vicoplus*, par 48.

stating that 'the status of "worker" is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons'.[308]

Vicoplus thus may appear to indicate that Members States have the right to impose work permit conditions on those that do not have access to the labour market, in a case concerning the hiring-out of personnel. However, as is clear from the *Essent* judgment, this is not the case. *Essent*, a company established in the Netherlands, contracted another Dutch company (BIS) to place scaffolding at one of its branch offices. BIS in turn relied on Ekinci, an undertaking established in Germany, to provide its employees to carry out the work. As such, the contractor hired personnel from a company in Germany to perform the service contract for *Essent*. An inspection by the Dutch labour inspectorate revealed that 33 of these hired workers were third-country nationals (Turkish) employed without a work permit, as was required by Dutch law, resulting in the imposing of fines on *Essent*.[309] The Court's judgment reiterates that the 'making available of labour' falls within the freedom to provide services, the condition being that the workers involved remain in the employ of the undertaking providing the workers. The fact that the workers in question are third-country nationals was irrelevant, as they were legally employed in Germany. The fact that *Essent* was not the company receiving the hiring-in services but rather the original service receiver (of scaffolding erecting services) was also irrelevant, as it was *Essent* that relied on the freedom to provide services to challenge the imposed penalties.[310] The Court followed its classic reasoning, indicating that the work permit obligation, and the 'conditions and restrictions in terms of deadlines which have to be met in order to obtain that work permit and the administrative burden involved in obtaining such a permit' impede the service of making available of workers.[311] Consequently, the work permit obligation requires justification. Interestingly, this is where the judgment takes a different turn than previous case law concerning the hiring-out of workers which has to do with the category of workers involved. *Vicoplus* emphasized that hiring-out services have an impact on the labour market due to the immediate arrival of large numbers of workers.[312] The difference between the *Essent* case and the *Vicoplus* lies in the fact that in the case of Polish workers, the Act of Accession explicitly provided the possibility to regulate access to the labour market. Recognizing the close relation between hiring-out and the regulation of access to the labour market led the Court to conclude that the work permit requirement imposed by the Netherlands

308 Case C-413/13 FNV *Kunsten Informatie en Media* ECLI:EU:C:2014:2411, par 33 and 36.
309 *Essent*, par 11-13.
310 *Essent*, par 37, 39 and 40.
311 *Essent*, par 47.
312 *Vicoplus*, par 34-37; *Lopes da Veiga*, par 10; *Rush Portuguesa*, par 13.

in *Vicoplus* was compatible with the freedom to provide services.[313] Thus, the Court takes the effects hiring-out has on the labour market into account due to the specific goal contained in Acts of Accession, the prevention of disturbances to the labour market during the transition period after an accession of new Member States. In *Essent*, this issue was not at stake, as that case concerned third-country nationals. The Court does not specify this, but it is evident that indeed there is no risk of mass influx of third country nationals, as the only third-country nationals that can be legally posted on the territory of a Member State are those already legally employed in another Member State. Legally phrased, there is no Act of Accession providing grounds for the Member States to restrict the posting of worker services due to the temporary right to restrict the freedom of workers of transition citizens.

As clearly stated by AG Bot in the Opinion accompanying the *Essent* case, this reasoning cannot 'automatically be applied (...) to a situation (...) where the requirement for a work permit concerns the hiring out (...) of nationals of non-member countries'.[314] Without the argument of preventing disturbances to the labour market due to the arrival of a large number of workers from newly joined Member States, what remains is a 'normal' justification of a work permit requirement on the basis of the objective of protecting the labour market.[315] The Court, now unsurprisingly, concludes that a work permit is disproportional as the aim is to protect the labour market from undertakings posting workers for another purpose than hiring-out services.[316] This check would thus be verifying that undertakings do not secretly employ third-country nationals on the Dutch territory under the guise of 'fake' service provision. This last situation would fall outside the Court's concept of posting (third-country national) workers, as it would entail genuine movement of labour by third-country nationals. Presumably, this is the criterion that the workers in question 'remain in the employ' of the undertaking providing the workers.[317] The Court does confuse matters slightly by then explaining that the goal to check whether the situation of the workers concerned are lawfully employed in the Member State where they are employed, which seems a different aim to justify measures by the host Member State.[318] Be that as it may, a work permit is clearly disproportional for such checks, as a simple prior declaration in the form of a 'succinct communication of the documents required' or a beforehand reporting obligation of the presence of one or more posted workers would suffice.

313 See in particular the explanation of AG Bot, Case C-91/13 *Essent Energie Productie BV v Minister van Sociale Zaken en Werkgelegenheid Opinion AG Bot* ECLI:EU:C:2014:312, par 102-110, and 114 in particular par 109-110 and 114.
314 *Essent* Opinion AG Bot, par 102-110, in particular par 111-112.
315 *Essent*, par 50-51; *Essent* Opinion AG Bot, par 117-118.
316 *Essent*, par 52.
317 Argument derived from *Essent*, par 54-55.
318 *Essent*, par 57.

This leads to the following interesting division. Firstly, the posting of workers falls within the freedom to provide services, and as such, any EU based company may post its legally employed employees on the territory of another Member State to perform a service contract. This explicitly includes employees that may not in their own right rely on the freedom of workers, i.e. transition citizens and third-country nationals.

Secondly, the making available of labour, or hiring-out is clearly classified as service provision. Member States may not restrict this right in relation to legally employed third-country nationals. However, due to the specific risk of a mass influx of workers during the transition period suspending the freedom of movement of workers for transition citizens, Member States may impose restrictions, including a work permit obligation, to such citizens.

3.4.3 Turkish nationals

In 1963 the EEC signed an Association Agreement with Turkey, the so-called Ankara Agreement.[319] The Ankara Agreement aimed at the establishing of a customs union between the signatories including free movement of workers, establishment and services. As was the case around that time in the EEC itself, the free movement of capital was to be liberated in accordance with the need to develop this customs union.[320] Once the customs union was developed 'far enough' the possibility of accession of Turkey to the Union was to be examined.[321] This, to date, has not happened, despite Turkey's formal application to the then EC in 1987, and it is unlikely that this will occur in the near future.[322] Nevertheless, the accession negotiations commenced in 2004 and are still ongoing. Since the initial signing of the Association Agreement a certain amount of progress towards Turkey's inclusion to the internal market was made. This has led to ECJ case law identifying the extent of free movement rights as provided on the basis of the Association Agreement. The Court's case law has led the status of Turkish workers to approach that of EU migrants.[323] However, movement rights granted to self-employed Turkish nationals are less extensive. The importance of this case law is significant, not least due

319 Agreement establishing an Association between the European Economic Community and Turkey, Ankara 12 September 1963 OJ (1964) 3687/64; Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force - Final Act - Declarations OJ (1964) L293/4.

320 Ankara Agreement, Articles 10, 12, 13 and 14.

321 Ankara Agreement, Article 28; S Peers 'Living in Sin: Legal Integration Under the EC-Turkey Customs Union' (1996) 7:3 *European Journal of International Law*, p 412.

322 The application to join was rejected in 1990, see European Commission 1989; Commission Opinion on Turkey's Request for Accession to the Community SEC (1989) 2290. Accession of Turkey to the Union has led, and will continue to lead to fierce debates. See for instance JK Glenn 'EU enlargement' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2003), p 227.

323 K Groenendijk 'Citizens and Third Country Nationals: Differential Treatment or Discrimination?' in JY Carlier and E Guild (eds) *The Future of Free Movement of Persons in the EU* (Bruylant, Brussels 2006), p 97-98.

to the fact that one quarter of all third-country nationals residing in the EU Member States are of Turkish nationality.[324]

The Additional Protocol, agreed upon in 1970, served as a basis for the second phase of association,[325] the gradual realization of free movement of workers between the EEC Member States and Turkey. It is the Additional Protocol that provided the Association Agreement with substance and it has largely been the governing basis for the relations between the two parties.[326] Article 36 provides that the establishment of free movement of workers should be finished before the end of 1986 and that the Council of Association shall decide on the rules necessary to that end.[327] Regarding the freedom of establishment and the free movement of service providers the Additional Protocol contains a standstill clause in Article 41. The Association Council made two decisions to establish the position of Turkish workers and their family, Decision 2/76 and Decision 1/80.[328] Both formed important steps towards free movement of workers, however, the realization of which to date was not completed.[329] Nevertheless, these decisions are particularly relevant for the position of Turkish nationals legally employed in the Member States, as they must enjoy free access to any paid employment of choice. Moreover, these decisions provide for a standstill clause regarding new restrictions relating to 'access to the employment of workers legally resident and employed in the territory of the contracting States'.[330]

The provisions concerning the position of legally employed Turkish nationals and the standstill clauses contained in Decisions 2/76 and 1/80 were held to have direct effect.[331] As to the freedom of establishment and the freedom to provide services, in contrast with the free movement of workers between the EEC and Turkey, the Association Council made no decisions to implement free movement for the self-employed, despite the decision making power conferred in Articles 22(1) Asso-

324 Groenendijk 2006, p 98.

325 See regarding the three phases of association, Ankara Agreement, Article 3.

326 Peers 1996, p 412.

327 Article 6 of the Ankara Agreement provides: 'To ensure the implementation and the progressive development of the Association, the Contracting Parties shall meet in a Council of Association which shall act within the powers conferred upon it by this Agreement.'

328 Decision No 2/76 of the Association Council of 20 December 1976 on the implementation of Article 12 of the Ankara Agreement; Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association. As noted by Groenendijk and Luiten, the texts of these Decisions were never published but they can be found in Migrantenrecht (1994) 1, p 14-17, K Groenendijk and M Luiten *Rechten van Turkse burgers op grond van de Associatie EEG-Turkije* (Wolf Legal Publishers, Nijmegen 2010), p 5.

329 Groenendijk and Luiten 2010, p 4-5.

330 Case C-192/89 *S. Z. Sevince v Staatssecretaris van Justitie* ECLI:EU:C:1990:322, par 17-18. See regarding the importance of these Decisions: Groenendijk and Luiten 2010, p 5-6. Earlier, the ECJ ruled that provisions of Association Agreements are part of Union law which makes them binding on the Member States and that the Court has jurisdiction to interpret these rules, case 12/86 *Demirel v Stadt Schwäbisch Gmünd* ECLI:EU:C:1987:400, par 7; moreover, the Decisions of the Council of Association are directly connected with the Association Agreement which means that they too form an integral part of the Union legal system, case 30/88 *Greece v Commission* ECLI:EU:C:1989:422, par 13; see for an overview Sevince, par 8-12.

331 *Sevince*, par 26; this chapter, par 3.6.1.2.

ciation Agreement and Article 41(2) Additional Protocol.[332] While these latter two provisions require further decisions to implement movement rights relating to the self-employed, in the *Savas* judgment Article 41(1) Additional Protocol, containing the standstill clause regarding new restrictions to the self-employed, was held to have direct effect:

> As its very wording shows, this provision lays down, clearly, precisely and unconditionally, an unequivocal standstill clause, prohibiting the contracting parties from introducing new restrictions on the freedom of establishment as from the date of entry into force of the Additional Protocol.[333]

The standstill clause in Article 13 of Decision 1/80 was held to be identical to that in Article 41(1) of the Additional Protocol. Consequently, Court rulings applying to one are equally valid regarding the other.[334] Article 41(1) Additional Protocol provides that the free movement provisions relating to self-employment in the TFEU must be extended, as far as possible, to Turkish nationals; thus the interpretation of the TFEU provisions applies, as far as possible, to the relevant provisions in the Association Agreement *acquis*. Therefore, terms contained in provisions of Association Agreements need to be interpreted in analogy with similar terms concerning the TFEU free movement provisions.[335] However, in *Demirkan* the Court clearly established that the interpretation of Article 56 TFEU itself cannot be transposed to the Association Agreement and the Additional Protocol due to differences of both purpose and context. As such, in that particular case the Court clarified that the extension to free movement of service receivers in the *Luisi and Carbone* case did not apply to Article 41(1) Additional Protocol.[336]

While Article 41(1) Additional Protocol cannot in itself confer a right of establishment, nor a right of freedom to provide services and therefore, as a corollary, a right of residence, a standstill clause does prohibit

> generally the introduction of any new measures having the object or effect of making the exercise by a Turkish national of those economic freedoms on the territory of that Member State subject to stricter conditions than those

332 See also: case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* ECLI:EU:C:2000:224, par 43-44.

333 *Savas*, par 46; confirmed in joined cases C-317/01 and C-369/01 *Erhan Abatay and Others and Nadi Sahin v Bundesanstalt fur Arbeit* ECLI:EU:C:2003:572, par 58-59; case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* ECLI:EU:C:2011:743, par 87.

334 *Savas*, par 50; *Abatay and Sahin*, par 70-74; case C-242/06 *Minister voor Vreemdelingenzaken en Integratie v T. Sahin* ECLI:EU:C:2009:554, par 65.

335 See also, *Abatay and Sahin*, par 112; see for an early example of the interpretation of Article 41(1) Additional Protocol in analogy with Article 53 EC Treaty (49 TFEU): Savas, par 47-48; case C-303/08 *Land Baden-Württemberg v Metin Bozkurt* ECLI:EU:C:2010:800, par 54-55; Groenendijk and Luiten 2010, p 6.

336 *Demirkan*, par 54-56 and 62.

> which applied to him at the time when the Additional Protocol entered into force with regard to the Member State concerned (...).[337]

Initially, the Court's jurisprudence focused on situations in which Turkish nationals were already legally residing on the territory of a Member State. As was clear from the *Kus* ruling, the standstill clause relating to employment did not concern first entry to the territory of a Member State.[338] In *Savas* the Court applied this case law to Article 41(1) Additional Protocol. Mr and Mrs Savas overstayed their one month UK tourist visa which expired on 21 January 1985, remaining in the UK for years after. In November 1989, Mr Savas started to operate a shirt factory without either him or his wife seeking authorization to remain in the UK as either an employed or self-employed person. After a lengthy period during which Mr and Mrs Savas tried to regularize their stay, during which they also opened two fast food businesses in the UK, they were served a deportation order on 31 August 1995. Only then were claims submitted by Mr and Mrs Savas's representatives on the basis of Article 41(1) Additional Protocol regarding which the High Court referred the matter to the ECJ.[339] The Court applied its earlier case law relating to fraudulent employment of Turkish workers by analogy to this situation. As such, the Court's judgment indicates that the Decisions of the Association Council, as well as the standstill clause contained in Article 41(1) Additional Protocol, cannot confer a right to employment or establishment[340] and, as their corollary the right to residence.[341]

This limitation relating to first entry no longer applies.[342] In 2007 the ECJ decided the *Tum and Dari* case, which concerned two Turkish nationals temporary residing in the UK who applied for visas to settle with the purpose of self-employment.[343] The Court provided that the manner of entry to the territory of a Member State, in casu without required entry clearance, is irrelevant for the question whether Turkish nationals can rely on the standstill clause of Article 41(1) Additional Protocol. As such, Tum and Dari, who had first applied for a UK residence permit on the basis of asylum, did not abuse Union law by then claiming residence on the basis of the Association Agreement and their wish to use their

337 *Dereci*, par 88; see also *Savas*, par 64 and 69 and case C-228/06 *Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland* ECLI:EU:C:2009:101, par 47.

338 Case C-237/91 *Kazim Kus v Landeshauptstadt Wiesbaden* ECLI:EU:C:1992:527, par 25 and 29; Groenendijk and Luiten 2010, p 6.

339 *Savas*, par 16-30.

340 Service provision is not specifically mentioned; however, as Article 41(1) addresses both, it is safe to assume that the judgment applies to that economic freedom as well.

341 *Savas*, par 61-63.

342 Groenendijk and Luiten 2010, p 6; NF Idriz and PJ Slot 'Free Movement of Persons between Turkey and the EU: the Hidden Potential of Article 41(1) of the Additional Protocol' (2010) 2 Centre for the Law of EU External Relations Working Papers, p 3-4.

343 Case C-16/05 *The Queen, Veli Tum and Mehmet Dari v Secretary of State for the Home Department* ECLI:EU:C:2007:530.

movement rights related to establishment.[344] In *Soysal and Savatli* the Court confirmed this interpretation and added to it by ruling that the standstill clause not only applies to legislation of the Member States, but also to EU secondary legislation. The *Soysal and Savatli* case concerned Turkish lorry drivers employed by an international company established in Turkey providing its services in Germany. The ECJ considered German visa legislation, which had entered into force on one July 1980, to form new restrictions. That these new restrictions were the implementation of secondary legislation did not alter that conclusion.[345] As the Additional Protocol entered into force on the first of January 1973, the legislation applying to Turkish nationals wishing to perform self-employed activities on the territory of a Member State at that time, should not be more liberal than the legislation applying in the present. However, the Additional Protocol provides that Turkish nationals should not benefit from rights more favourable than those granted to citizens of the Union.[346] As indicated, terms contained in provisions of Association Agreements need to be interpreted in analogy with similar terms concerning the TFEU free movement provisions. As such, in *Abatay and Sahin* the Court provides that restrictions to the freedom to provide services, as warranted by the EEC – Turkey Association Agreement *acquis*, are similar to those under general Union law. Referring to cases such as *Säger* and *Rush Portuguesa*, the Court clearly provides that the developments relating to the freedom to provide services applies to the term as provided in the Additional Protocol. Consequently, new restrictions as identified in this chapter, introduced since the first of January 1973 to the freedom to provide services may not be applied to Turkish nationals.[347] The same holds true for the scope of the free movement provisions contained in the EEC – Turkey Association Agreements *acquis* which is therefore interpreted in line with the scope of the TFEU provisions.[348]

The consequences of the standstill clause for national law thus vary depending on the legislation of a specific Member State as it stood in 1973. Examples of these consequences can be found in the Court's case law. *Abatay and others* concerned employees (drivers) of a company importing Turkish fruit and vegetables to Germany. The employing company was established in Turkey, but that company was the subsidiary of a company established in Germany. German legislation, which was applicable from 10 October 1996 required the employer of the Turkish employees to obtain work permits.[349] As is apparent from the Court's case law concerning Article 56 TFEU, a work permit constitutes a restriction to that provision,

344 *Tum and Dari*, par 59-60 and 67-68; case C-92/07 *Commission v Netherlands* ECLI:EU:C:2010:228, par 49-50; *Sahin*, par 64.
345 *Soysal and Savatli*, par 44, 52, 56-59.
346 Article 59 Additional Protocol, see also: *Commission v Netherlands* (C-92/07), par 25
347 This chapter, par 3.5.
348 This chapter, par. 3.2.
349 *Abatay and Sahin*, par 28-32.

and accordingly, it is considered a restriction in light of Article 41(1) Additional Protocol. The Court:

> It must be added that a work permit, which is intended to regulate the access of foreign workers to the national employment market, does not appear to be an appropriate measure for workers employed by an undertaking established in a non-member country who are temporarily sent to a Member State to provide services but do not in any way seek access to the labour market in that second State, as they return to their country of origin or residence after completion of their work (...).[350]

In *Commission v Netherlands* the ECJ was confronted with charger imposed on Turkish nationals in relation to residence permits. As Article 59 Additional Protocol requires that conditions for Turkish nationals should not be more favourable to those concerning EU citizens, the standstill clause does not prevent the application of fees in itself, as EU citizens were confronted with charges for the issue of residence papers as well. While slight differences between such charges might be considered proportionate due to differences between the two categories, the differences in this case amounted to more than two-thirds higher for Turkish nationals, which according to the ECJ were not minimal and therefore disproportionate.[351]

3.5 EU rights provided to service suppliers

The substantive free movement provisions are formulated as prohibitions on discrimination on the ground of nationality. The Court indicated that the principle of non-discrimination requires 'perfect equality of treatment in Member States of persons in a situation governed by [Union] law and nationals of the Member States in question'.[352] The Court has interpreted the free movement provisions much broader, leading them to prohibit any measure that is liable to hinder trade. This specifically includes non-discriminatory measures. The basic principle under EU law is that barriers to cross-border trade must be removed unless they can be objectively justified. This paragraph will provide an overview of the rights derived from the freedom of movement for service providers. As the extent of these rights is determined by the derogations available to the Member States to limit these rights, an overview of these derogations will follow. Besides ensuring fair competition, various flanking measures aim at ensuring mobility. For example, movement

350 *Abatay and Sahin*, par 116, the Court specifically refers to *Rush Portuguesa* and *Vander Elst*; this chapter par 3.4.2.
351 C-92/07 *Commission v Netherlands* ECLI:EU:C:2010:228, par 13, 53, 55 and par 74.
352 Case C-43/95 *Data Delecta Aktiebolag and Ronny Forsberg v MSL Dynamics Ltd* ECLI:EU:C:1996:357, par 16.

rights for family members and rights of social security for migrants are conditions to ensure that mobility is utilized in practice. Therefore, these measures aim at the creation of the internal market in which mobility is ensured, providing a level playing field for competitors. The main elements of two of such flanking measures, Directive 2004/38/EC (the Citizens Rights Directive, CRD) and Directive 96/71/EC (the Posted Workers Directive, PWD) which are relevant to the topic discussed in this research, will be described at the end of this paragraph. The negotiating history of Directive 2006/123/EC (the Services Directive) is relevant for this research as well, as it again reveals the reluctance of EU Member States to relinquish control over their labour market, in particular in relation to posted workers. However, the material substance of that Directive will not be discussed in depth. In part due to this difficult negotiation process, the substance of the Services Directive simply does not cover immigration control and access to the labour market. The resulting directive is therefore materially no longer relevant to this study and the implementation of this Directive will not be discussed in chapters five and six. However, the discussion itself is therefore all the more relevant.

3.5.1 From direct and indirect discrimination to market access

As consistently explained by the Court: '[D]iscrimination can consist only of the application of different rules to comparable situations or the application of the same rule to different situations.'[353] The principle of non-discrimination ensures that migrants enjoy similar treatment as nationals. The freedom of service provision basically tries to ensure that service providers can compete on an equal footing with nationals in the host Member State. The ECJ made clear that discrimination relates to both direct (or overt) discrimination and indirect (or covert) discrimination. While overt discrimination entails a distinction made on the basis of nationality, covert discrimination is based on the application of other criteria of differentiation that factually lead to the same result.[354] The distinction between direct and indirect discrimination is important as national measures based on direct discrimination can only be justified on the basis of the express derogations provided in the Treaty.[355] From the perspective of free movement of persons, the measures that are most damaging to mobility are refusal of entry to a Member State and expulsion from a Member State.[356] As international law does not allow states to take such measures against their own nationals, refusal of entry and ex-

353 Case C-411/98 *Angelo Ferlini v Centre hospitalier de Luxembourg* ECLI:EU:C:2000:530, par 51.
354 *Sotgiu*, par 11; case 22/80 *Boussac Saint-Frères SA v Brigitte Gerstenmeier* ECLI:EU:C:1980 :251, par 9.
355 This chapter, par 3.5.2.
356 See case 41/74 *Yvonne Van Duyn v Home Office* ECLI:EU:C:1974:133, par 22-23 (concerning refusal of entry) and case 30/77 *Régina v Pierre Bouchereau* ECLI:EU:C:1977:172 (concerning expulsion). See also case C-348/96 *Criminal Proceedings against Donatella Calfa* ECLI:EU:C:1999:6 concerning an unjustified permanent banishment from the country by the Greek authorities.

pulsion can only target migrants. Therefore, as they distinguish on the basis of nationality, these measures are always directly discriminatory.[357] As such, Directive 2004/ 38/EC, concerning the movement and residence rights of EU citizens, only contains the express Treaty derogations as a means of justifying restrictions to these rights codified in the Directive.[358] Indirectly discriminatory measures are based on an objective criterion, but in practice the burden of the measure mostly affects nationals or companies of other Member States.[359] Classical examples of indirect discrimination are measures that distinguish on the basis of language[360] and residence.[361] A less obvious example of a measure that appears objective, but in practice only affects non-nationals is provided by the *Schonenberg* case. The subject of this case was a measure adopted by the Irish government on the basis of which fishing boats exceeding a certain length and engine power were prohibited from fishing in certain areas. This measure, though directed objectively at all fishing ships, in reality mostly affected fishing ships from other Member States.[362]

Particularly important to the field of free movement of service providers are measures that differentiate on the basis of qualification or licence requirements. The need to comply with qualification and licence requirements of the host state are indirectly discriminatory if they lead to a double burden for the service provider due to compliance with two sets of rules, those of the state of establishment and the host state where the service is provided. As noted by Snell, this amounts to the adoption of a principle of mutual recognition regarding the free movement of services.[363] From the *Morgenbesser* case, concerning establishment, it is clear that national authorities need to take into account existing qualifications, including the 'whole of the training, academic and professional, which that person is able to demonstrate'.[364] This principle of mutual recognition applies to the freedom of movement for service providers as well.[365] Furthermore, for several services sectors it is often required to enter a national professional association, such as the bar association for lawyers, before one can provide services in a particular Member State. Entry requirements to such associations such as a residence or nationality requirement are considered to be discriminatory by the Court. Naturally, whether such measures are directly or indirectly discriminatory depends on the nature of

357 *Calfa*, par 20.
358 Directive 2004/38, chapter VI.
359 *Sotgiu*, par 11.
360 Case 379/87 *Groener v Minister for Education* ECLI:EU:C:1989:559.
361 The *Sotgiu* case provides an example of indirect discrimination based on origin or residence in the field of free movement of workers, *Sotgiu*, par 11.
362 Case 88/77 *Minister for Fisheries v C.A. Schonenberg and others* ECLI:EU:C:1978:30.
363 J Snell 'Free Movement of Services and the Services Directive: The Legitimacy of the Case Law' in J van de Gronden (ed) *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?* (Wolters Kluwer, Alphen aan den Rijn 2009), p 31.
364 Case C-313/01 *Christine Morgenbesser v Consiglio dell'Ordine degli avvocati di Genova* ECLI:EU:C:2003:612, par 66.
365 Joined cases 110/78 and 111/78 *Ministère public and "Chambre syndicale des agents artistiques et impresarii de Belgique" ASBL v Willy van Wesemael and others* ECLI:EU:C:1979:8, par 27-30; *Säger*, par 15.

the requirement. In the *Reyners* case, entry to the bar association for non-Belgian nationals in Belgium was subject to conditions which did not apply to Belgian nationals, which constitutes direct discrimination.[366]

Market access

Non-discrimination does not interfere with the autonomy of a Member State to determine its national legislation.[367] However, during the 1990s the ECJ has shifted its interpretation from non-discrimination to an approach questioning all restrictions hindering cross-border trade.[368] In the seminal *Säger v Dennemeyer* case the Court provided that:

> (...) Article [56] of the [TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.

In *Alpine Investments* a financial service provider established in the Netherlands brought a Dutch measure prohibiting the selling method of cold-calling before the Court, as that measure prevented it from calling potential clients in other Member States. The measure itself was non-discriminatory and prohibited cold-calling from both within and from outside the Netherlands.[369] The Court established that the measure:

> deprives the operators concerned of a rapid and direct technique for marketing and for contracting potential clients in other Member States. It can therefore constitute a restriction on the freedom to provide cross-border services.[370]

As the prohibition affects 'offers made to potential recipients in another Member State' it therefore 'directly affects access to the market in services on the other Member States and is thus capable of hindering intra-[Union] trade in services'.[371]

366 See for example: case 2/74 *Jean Reyners v Belgian State* ECLI:EU:C:1974:68.
367 Barnard 2013, p 17.
368 V Hatzopoulos and T Uyen Do 'The Case Law of the ECJ Concerning the Free Movement Provision of Services: 2000-2005' (2006) 43 *Common Market Law Review*, p 976, who conclude that this shift is confirmed by an increase of ECJ cases concerning the freedom to provide services from 40 cases between 1995-1999 to 140 between 2000-2005; see also: Craig and de Búrca 2015, p 665 and 712, and specifically regarding the freedom to provide services p 795; Barnard 2013, p 260-262.
369 *Alpine Investments*, par 35.
370 *Alpine Investments*, par 28.
371 *Alpine Investments*, par 38.

The Court found that the good reputation of the Netherlands financial markets was a valid objective to justify the restriction to trade and that the measure itself was proportionate.[372] For a non-discriminatory measure to breach Article 56 it is not required that market access is indeed affected. The potential to prohibit, impede or render less attractive the activities of a service provider is enough. Once this potential is established, the measure breaches the Treaty and needs to be justified.[373] As explained by Barnard, the market access approach was adopted in the fields of free movement of establishment, workers, citizens and capital as well.[374] However, the language has changed to the wording 'restriction' or 'obstacle' to free movement, which according to Barnard may be due to the 'cumbersome language involved and the unsuitability of applying the language of "market access" to certain groups – such as retired migrant citizens'.[375]

This line of jurisprudence and the restriction (or obstacles) approach is now consistently held by the Court:

> It is settled case-law that Article [56 TFEU] requires not only the elimination of all discrimination against service providers established in another Member State on the ground of their nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit, impede or render less attractive the activities of a service provider established in another Member State where it lawfully provides similar services (...).[376]

3.5.2 Justification grounds

Initially, derogations to the free movement provisions were limited to several specifically listed grounds. The Treaty derogations, also referred to as express derogations, relating to the freedom of service suppliers are limited to the grounds of public policy, public security, public health and the public service exception. In addition, the Court has developed the Rule of Reason which may be invoked in relation to a non-exhaustive number of grounds relating to the public interest. It is not clear where the observance of fundamental rights fits in this division of justifications. The Court has clearly recognized that fundamental rights indeed may impose limits on fundamental freedoms, yet such limitations may take the form of a

372 *Alpine Investments*, par 43-44 and 55.
373 *Säger*, par 15; Barnard 2013, p 262.
374 See for example regarding the freedom of establishment: *Gebhard*, par 37.
375 Barnard 2013, p 256-257; the change in language does not reflect a substantial change.
376 Case C-357/10 *Duomo Gpa and Others* ECLI:EU:C:2012:283, par 36; Joined cases 403/08 and C-429/ 08 *Football Association Premier League and Others* ECLI:EU:C:2011:631, par 85.

Rule of Reason justification, or the fundamental right is seen as part of the public policy justification ground. In the *Omega* case the Court indicates:

> [T]he protection of [fundamental rights] is a legitimate interest which, in principle, justifies a restriction of the (...) freedom to provide services (...). However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee (...).[377]

On the other hand, in the *Laval* and *Viking* cases the fundamental rights at issue seem to form separate public interest grounds to justify a restriction of a fundamental freedom which fits the Rule of Reason approach.[378] The *Schmidberger* case initially seems to indicate that fundamental rights constitute a legitimate interest in the sense of the Rule of Reason. However, the Court goes on to indicate that the fundamental freedom and the fundamental right form two interests which 'must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests'. As with all justification grounds, the proportionality principle is then used by the Court as the yardstick to perform this exercise.[379]

There is only room for these justification grounds, be it the express derogations grounds provided in the Treaty or the justifications in the public interest, if the subject of justification is not regulated by harmonization. Where the Union legislator has acted, the situation must be dealt with on the basis of secondary legislation.[380]

Express derogations

The use of the derogation grounds public policy, public security and public health relating to measures concerning entry into the territory, issue or renewal of residence permits, or expulsion from the territory, is regulated in secondary legislation. All mobility and residence rights, including the derogation grounds, are codified in the Citizens Rights Directive.[381] The Court usually considers public security as a specific ground within the broader heading of public policy, and these grounds are therefore not often separated in case law.[382] The Court has strongly limited the grounds of public policy and security to scenarios where migrants ex-

377 *Omega*, par 35-36.
378 *Laval*, par 101; *Viking*, par 75, see extensively Tans 2008, p 270-272.
379 Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Osterreich* ECLI:EU:C:2003:333, par 74 and 81. See extensively SA de Vries 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9:1 *Utrecht Law Review*, p 187-188.
380 Barnard 2013, p 449; case C-1/96 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd* ECLI:EU:C:1998:113, par 41.
381 Directive 2004/38/EC.
382 Barnard 2013, p 498.

ercising their free movement rights would constitute 'a genuine and sufficiently serious threat affecting one of the fundamental interests of society'.[383] Moreover, the reason for restricting rights on these grounds must lie in personal conduct which constitutes a present threat. Thus, deportation of a general preventive nature, for instance based on a rise of violence among immigrant communities, cannot be justified on the ground of public policy and public security. The same holds true for previous conduct (such as criminal convictions) as that is only relevant if it demonstrates a likeliness that the individual will act similarly again.[384]

The ground of public policy is not intended to impose a uniform set of values as to what constitutes a threat to it. What might be considered a threat to public policy in one Member State may be unproblematic in another. Though the definition as to what constitutes a justification on this ground is provided uniformly by the Court itself, Member States have a certain margin of discretion reflecting the different values that constitute a Member States public policy.[385] For example, in the *Omega* case, the Court accepted the German authority's public policy justification to restrict the exploitation of the commercial exploitation of games involving simulation of acts of violence, in particular homicide, as such games are considered to violate the constitutionally protected human dignity. The fact that these games were lawfully marketed in the United Kingdom clearly indicates that the protection of public policy interests awarded by the Treaty may vary.[386] However, restrictions based on public policy are only allowed if they are genuine reflections of a particular Member States set of morals and values. As consistently held by the Court, allowing certain activities to nationals, such as prostitution, automatically indicates that such conduct clearly does not violate that Member States public order.[387]

The public health derogation ground can be used to restrict freedom of movement in light of diseases with epidemic potential. Directive 2004/38/EC indicates that the use of the public health ground to restrict an individual's movement rights must relate to diseases with epidemic potential as defined by the relevant instruments of the World Health Organization. Alternatively, other infectious diseases or contagious parasitic diseases can lead to justified restrictions of free movement, but only if the protection provisions apply to nationals of the host Member State as well.[388] Contrary to the public policy and public security, the public health derogation ground can only be used to refuse initial entry or to refuse the first residence certificate or card. Thus, once a EU citizen resides for a period longer than the first

383 Initially, these concepts were elaborated upon in Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health OJ (1964) 56/850, in particular articles 2-4; case *Bouchereau*, par 35.

384 *Bouchereau*, par 28-29.

385 *Van Duyn*, par 18; *Omega*, par 30-31; see also *Jany*, par 60.

386 *Omega*, par 25, 32, 37-40.

387 Joined cases C-115/81 and 116/81 *Adoui and Cornuaille v Belgian State* ECLI:EU:C:1982:183, par 8; Jany, par 61.

388 Directive 2004/38/EC, Article 29(1).

three months the public health derogation ground can no longer be used.[389] As with public policy and security, the public health exception can be invoked to justify restrictions of the fundamental freedoms which are not related to movement and residence rights as well. Thus, public health can be invoked to justify a Member States health and welfare policies that constitute barriers to free movement of workers, the freedom of service provision and the freedom of establishment. Prime examples can be found in the Court's case law concerning a Member State's health care system. As such, the Court allows a system where nationals need to obtain prior authorization to receive non-emergency medical treatment in other Member States.[390] Finally, certain jobs in the public sector of a Member State can be limited to nationals where such functions require 'a specific bond of allegiance and mutuality of rights and duties between State and employee'.[391] Thus, certain forms of employment in the public service and certain activities which in that State are connected, even occasionally, with the exercise of official authority, can be reserved for nationals only.[392] The ECJ has interpreted this derogation ground narrowly, examining on a case by case basis whether the tasks and responsibilities inherent in the post indeed require such a specific bond of allegiance.[393] As the answer to the question whether a certain position or activity is covered by the exception is rather casuistic, in general it can be stated that senior government positions are covered, whereas cases where the 'exercise of public law powers is marginal and ancillary to the principal function of the posts', are not covered.[394]

The application of the express justification grounds might lead to confusion due to the fact that these grounds can be invoked by Member States in different situations. A distinction is made between migration rights (exit, entry and residence) and market access rights (the right to provide the service). In situations where migration rights are limited, the Citizens Rights Directive applies, thus the Member State must rely on the codified version of public policy, public security and public health contained in that Directive. If the specific service provided which falls within the scope of the Services Directive, a Member State must rely on the codified version of these derogations as contained in that directive. In general, Article 3(1) of the Services Directive provides that cases which fall within specific Directives (regulating a specific activity or profession) should, in cases of conflict, be settled on the

389 Barnard 2013, p 511; Directive 2004/38/EC, Article 29(2).

390 Case C-158/96 *Raymond Kohll v Union des caisses de maladie* ECLI:EU:C:1998:171; *Geraets-Smits and. Peerbooms*; for a more thorough explanation see: Barnard 2013, p 511-512.

391 *Lawrie-Blum*, par 27; case 149/79 *Commission v Belgium* ECLI:EU:C:1982:195, par 7; see in general: Craig and de Búrca 2015, p 768.

392 Article 45(4) TFEU concerns the restriction to Article 45 TFEU and Article 51 TFEU concerns the restriction to articles 49 and 56 TFEU (in conjunction with article 62 TFEU). These provisions differ in language as the first concerns employment (workers), while the second concerns economic activities (services and establishment).

393 *Commission v Belgium* (149/79), par 8; case C-473/93 *Commission v Luxembourg* ECLI:EU:C:1996:263, par 27; Barnard 2013 p 518.

394 Barnard 2013, p 519.

basis of the specific Directive. As to the derogation grounds, as provided in Article 17(8), Article 16 of the Services Directive (containing the public policy, public security and public health derogation grounds) cannot be invoked to justify derogations relating to migration rights; such restrictions must be based on the provisions of Directive 2004/38/EC. This leaves two situations, service provision covered by the Services Directive (thus not falling within a specific directive) and service provision which is not covered by a specific directive and not by the Services Directive. Market access rights relating to the first type of service provision can be restricted on the basis of Article 16 of the Services Directive. As to the second type, for example private security services,[395] market access rights can be justified on the basis of the Treaty provisions. There should be no difference as to the application of the derogation grounds on the basis of the TFEU or a directive, be it the CRD or the SD. It remains to be seen whether the Court will interpret Article 16(b) of the Services Directive in a similar fashion. However, the ECJ jurisprudence has imposed a certain threshold in relation to the derogation grounds to ensure that Member States only restrict the fundamental freedom of service provision on the basis of a serious threat to the fundamental interest of society. This threat may be derived from the person of the service provider (a contagious disease or hardened criminal offences) or the type of service itself (prostitution, abortion, euthanasia). However, this threshold relates to the invocation of the derogation itself.

In all circumstances, the ground is interpreted restrictively; in the words of the Court in *Adoui and Cornuaille*: a present 'genuine and sufficiently serious threat affecting one of the fundamental interests of society' which lies in the personal conduct of the service provider. Thus, the *Adoui and Cornuaille* formula relates to the derogation grounds, and not to a specific service provider. This is why the Court indicates that this fundamental interest is not present whenever a certain type of conduct is not prohibited in relation to the Member States own nationals, clearly the invoked interest is not fundamental if nationals are not the subject of the measure restricting nationals of other Member States.[396] This is also apparent from the codified versions of the derogation grounds. The *Adoui and Cornuaille* formula is used to determine whether the interest invoked is worthy (above the threshold) to allow a derogation from the fundamental freedoms. Article 16(b) of the Services Directive has placed the public policy, public security and public health justification grounds as part of the necessity test of the proportionality principle. A derogation requires justification on the basis of a worthy interest which in itself is verified on the basis of the *Adoui and Cornuaille* formula.

395 Exempted from Directive 2006/123/EC, Article 2(2) under k.
396 *Adoui and Cornuaille*, par 9.

Overriding reasons relating to the public interest

The fundamental freedoms are interpreted broadly by the Court.[397] Additionally, as consistently held by the Court, a justification for derogating from the fundamental freedoms must be interpreted strictly.[398] Finally, the Court has held the Treaty derogations to be exhaustive and is unwilling to add new grounds.[399] Direct discrimination in itself divides a particular market on the basis of nationality, which goes against the essence of the internal market. The original Treaty thus provided only a few derogation grounds which are considered to be fundamental to the nation state.[400] Indirect discrimination is different, as the distinction itself is not made on the basis of nationality. It is possible that the Member State has a valid reason to make the distinction which does not relate to the Treaty derogations.

The Court's broad interpretation of the concept of discrimination entails that the express derogations provided by the Treaty are no longer sufficient to satisfy the need for regulation. Any licence or diploma requirement for certain forms of employment, or for certain economic activities, can be considered a barrier to trade. Nevertheless, Union law does not intend to remove the requirement of a diploma for lawyers. In order to address the need to regulate, the ECJ has developed a non-exhaustive justification ground which is referred to as the Rule of Reason.[401] This open list of justification grounds can be invoked to serve various regulatory objectives. The Court itself has provided a list of examples in the *Gouda* case: professional rules intended to protect the recipients of a service, protection of intellectual property, protection of workers, consumer protection, conservation of the national historic and artistic heritage, and cultural policy.[402] In many other cases different grounds have been recognized by the Court,[403] including prevention of social dumping,[404] unfair competition,[405] prevention of abuse of free movement of

397 This chapter, par 3.3.1.

398 As exceptions to the freedom to provide services, these grounds can be found in Article 52 TFEU, which applies to the Chapter on services due to Article 62 TFEU; see for examples of the narrow interpretation of these grounds *Van Duyn*, par 18; case C-114/97 *Commission v Spain* ECLI:EU:C:1998:519, par 34; in Orfanopoulos the Court indicated that 'a particularly restrictive' interpretation of the derogations is needed when dealing with movement cases of EU citizens, joined cases C-482/01 and C-493/01 *Georgios Orfanopoulos and others and Raffaele Oliveri v Land Baden-Württemberg* ECLI:EU:C:2004:262, par 53; see also: Commission action in respect of the application of Article 48(4) of the EEC Treaty of 7 January 1988, Freedom of movement and access to employment in the public service of the Member States OJ (1988) C72/2.

399 Barnard 2013, p 497; case C-17/92 *Federación de Distribuidores Cinematográficos v Estado Español et Unión de Productpres de Come y Televisión* ECLI:EU:C:1993:172, par 20, refusing cultural policy as one of the grounds for justification contained in article 52 TFEU.

400 For the right of establishment the Treaty derogations are contained in Articles 51 and 52 TFEU. Article 62 TFEU indicates that these provisions also apply to the freedom to provide services.

401 The Court itself refers to objective justification (used in the context of workers), justifications in the public interest (used in the context of self-employment) or mandatory requirements (used in the context of goods), Barnard 2013, p 528.

402 Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* ECLI:EU:C:1991:323.

403 For a very thorough overview see: Barnard 2013, p 529-533.

404 *Commission v Germany* (C-244/04), par 61; Laval, par 103.

405 Case C-60/03 *Wolff & Muller v Pereira Félix* ECLI:EU:C:2004:610, par 41.

services,[406] social protection of workers,[407] and combating illegal employment.[408] This open list of justification grounds only applies to indirect discrimination and non-discriminatory measures that hinder market access. Direct discrimination, by dividing the market along lines of nationality, is presumed to have a stronger negative effect on the internal market. Such measures can only be justified by the express derogation grounds listed in the Treaty. The Rule of Reason can be relied upon to justify indirect discrimination and non-discriminatory measures hindering trade.

However, an important exception to this division applies in the field of services. A residence requirement regarding service provision is particularly troubling as it goes against the idea of the temporary nature of the freedom to provide services. The distinguishing feature with the freedom of establishment is that the service provider stays in the host state on a temporary basis.[409] Phrased differently, national rules applying to permanently established service providers will not automatically apply to 'the temporary activities of undertakings which are established in other Member States'.[410] Therefore, the ECJ indicated in the *Gouda* case that discrimination in the field of services based on the fact that a service provider is established in another Member State can only be justified by relying on the express derogation grounds.[411] Finally, some of the ECJ case law seems to indicate that this strict system in which direct discrimination can only be justified on the basis of the express Treaty derogations is subject to change. As such, in the *Placanica* case, the Court seems to move towards allowing distinctly applicable measures to be justified by the express derogations, and the open list of public interest requirements.[412]

Proportionality

Invoking a justification ground entails that the Member State claims that its specific regulatory purpose, and the manner in which that purpose is achieved, is of such importance that a derogation to the internal market must be accepted. The Court has consistently ruled that the question whether a specific measure infringes a free movement provision, should be determined on the basis of the principle of propor-

406 *Commission v Germany* (C-244/04), par 38.
407 Case C-255/04 *Commission v France* ECLI:EU:C:2006:401, par 47.
408 Case *Commission v France* (C-255/04), par 52.
409 This chapter, par 3.3.2.2.
410 Case 205/84 *Commission v Germany* ECLI:EU:C:1986:463, par 26; see also: *Säger*, par 13.
411 *Stichting Collectieve Antennevoorziening Gouda*, par 10; see also the above described case: *Van Binsbergen*, par 16 and 17; Barnard 2013, p 382-383, referring to case C-546/07 *Commission v Germany* ECLI:EU:C:2010:25.
412 Joined cases C-338/04, C-359/04 and C-360/04 *Criminal proceedings against Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio* ECLI:EU:C:2007:133; see for a similar move relating to free movement of goods: case C-524/07 *Commission v Austria* ECLI:EU:C:2008:717, par 54 and 55; Barnard 2013, p 171 (goods) and p 247 (free movement of persons).

tionality.[413] In its most elaborate form, the principle entails a threefold test. First, the measure adopted by the legislator must be intended to serve one a legitimate objectives. Moreover, the measure must be suitable for securing the attainment of the objective which it pursues. In a sense, this step requires that there is a causal link between the measure and the objective. If that link is missing, the legislator has clearly taken a measure which is arbitrary. In short, the question here is not whether the measure was the only, or the best possible measure, but simply whether it was manifestly inappropriate.[414] Second, it should not be possible to obtain the same result by less restrictive rules. Thus, 'when there is a choice between several appropriate measures recourse must be had to the least onerous'.[415] Third, a measure must not go beyond what is necessary to attain the objective.[416] The third step, sometimes referred to as proportionality *sensu stricto*, requires that 'the disadvantages caused must not be disproportionate to the aims pursued'.[417] In other words, this aspect of the principle entails a true weighing of interests.

However, it is very common that the Court applies the principle in two steps, whether the measures are suitable and whether the measure does not go beyond what is necessary, in the sense that there is no less restrictive alternative available.[418] As such, the number of cases where the ECJ explicitly formulates the principle of proportionality in words relating to the third step, which is as a weighing of interests, is rare.[419] The three stages of the proportionality test, in its form as the weighing principle to determine whether an infringement of a fundamental freedom can be justified, should be seen in light of the separation of governmental powers. With each step the intensity of the judicial control increases, and the problem of the judicial power encroaching on the territory of the legislator becomes more acute.[420] Partly, this explains the Court's reluctance to apply the proportionality *sensu stricto*.[421] Determining whether national measures restricting the internal

413 Case C-331/88 *The Queen. v The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others* ECLI:EU:C:1990:391, par 13.

414 See for instance: case C-189/01 *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren v Minister van Landbouw, Natuurbeheer en Visserij* ECLI:EU:C:2001:420, par 83.

415 Joined cases C-133/93, C-300/93 and case C-362/93 *Antonio Crispoltoni v Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v Donatab Srl* ECLI:EU:C:1994:364, par 41; Jippes, par 81.

416 *Fedesa*, par 13.

417 *Crispoltoni and Others*, par 40; *Jippes*, par 81.

418 *Laval*, par 101; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* ECLI:EU:C:2007:772, par 75; Chalmers, Davies and Monti 2014, p 400-401.

419 A clear example is provided in: case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q plc* ECLI:EU:C:1992:519, in which the Court had to determine whether the regulatory goal of protecting employees by restricting store opening hours on Sunday did not entail a disproportionate infringement of the free movement of goods. In relation to citizenship another example is provided in: case C-413/99 *Baumbast and R v Secretary of State for the Home Department* ECLI:EU:C:2002:493, par 91-93.

420 JH Jans, S Prechal and RJGM Widdershoven *Inleiding tot het Europees Bestuursrecht* (Ars Aequi Libri, Nijmegen 2011), p146-147.

421 That this only partly explains the Court's approach has to do with the fact that the Court is sometimes inconsistent in applying the steps, or even fails to apply the principle altogether, Jans, Prechal and Widdershoven 2011, p 144; see for example: case C-379/98 *PreussenElektra AG v Schleswag AG* ECLI:EU:C:2001:160.

market can be justified requires the ECJ to rule on a subject where the Union legislator has, by definition, not acted yet, otherwise the matter must be dealt with on the basis of secondary legislation.[422] At the same time, the ECJ has to determine whether the national measure and the national regulatory goal allow a derogation of the fundamental freedom, which requires the Court to encroach on the national legislator's territory as well.[423] This tension arises in relation to legislation, either national legislation or Union legislation. For instance, in relation to judicial review of executive decisions, applying the proportionality principle is simply a form of administrative review which does not involve choices that are normally made by the legislator.[424]

To justify restrictions to free movement, the ECJ has accepted a wide range of legitimate objectives. However, measures that have an economic aim are never accepted by the Court as a justified restriction to the free movement provisions.[425] Naturally, the express derogations already aim at recognized legitimate objectives as these are specifically provided for in the TFEU. As a final point the justification of measures relating to refusal of entry, or deportation, need to be, where appropriate, compatible with fundamental human rights.[426]

3.5.3 Harmonization

The freedom to provide services indicates the boundaries within which Member States may regulate service provision on their territory, a matter which is referred to within the literature as negative integration. Harmonization takes a different approach, positively providing the rules which Member States must observe or impose. Depending on the type of harmonization, secondary legislation exhausts the discretion of Member States to regulate affairs to a lesser or greater extend. Maximum harmonization leaves no discretion, while minimum harmonization provides a ground level which the Member States must impose, leaving discretion to regulate a matter above this ground level. What is deemed to be 'above' depends on the subject-matter. For instance, minimum harmonization relating to consumer protection would leave a Member State free to provide stronger protection for

422 *Compassion in World Farming*, par 41.

423 Jans, Prechal and Widdershoven 2011, p 147. Note that where the Court has to determine the legality of Union legislation, the intensity of the review depends on whether the Union act was taken in a field where the Union legislator has discretionary power, such as the Common Agricultural Policy. In those cases, the Court will only determine whether the measure is 'manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue'. This entails a review limited to the first step of the proportionality principle, case 265/87 *Hermann Schräder HS Kraftfutter GmbH & Co* ECLI:EU:C:1989:303, par 21 and 22; *Fedesa*, par 8 and 14; *Jippes*, par 80 and 82; see also: *Karner*, par 51.

424 Jans, Prechal and Widdershoven 2011, p 146.

425 Barnard 2013, p 533; *Bond van Adverteerders*, par 34.

426 Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas en Nicolaos Avdellas and others* ECLI:EU:C:1991:254, par 43; see also *Orfanopoulos and Oliveri*, confirmed in case C-441/02 *Commission v Germany* ECLI:EU:C:2006:253, par 108-109.

consumers, be it within the confinements of the free movement provisions. As explained in the previous paragraph, recourse to the Treaty exceptions or objective justification grounds is no longer possible if harmonization includes the justification grounds.[427] Service regulation addresses the service provider and the service itself; hence secondary legislation can be classified in two broad categories. Rules can address the free movement of persons, the entry and residence rules, and they can address the service itself, for instance, the conditions under which a service can be provided or liability rules.[428]

The secondary legislation that will be discussed here is limited to Directive 96/71/EC (the Posted Workers Directive), Directive 2004/38/EC (the Citizens Rights Directive) and Directive 2006/123/EC (the Services Directive). These Directives are most relevant for the topic under discussion here, liberalization of service mobility. Directive 2004/38/EC codifies the conditions under which Member States may regulate movement of service providers. Directive 96/71/EC regulates which elements of the host states labour laws and collective agreements may be applied to posted workers. The drafting of the Services Directive has led to various discussions, some of which centering on social dumping. As a consequence, the topic of labour regulation was left out of its scope. The substance of the resulting directive is therefore no longer relevant to this study and the implementation of this Directive will not be discussed in chapters five and six. However, the discussion itself is therefore all the more relevant. A brief discussion of the substance itself is also relevant in relation to the impact the Directive would have had, which helps in understanding its negotiating history.

3.5.3.1 The Posted Workers Directive

As service provision normally is based on the principle of home state control, Directive 96/71/EC was specifically adopted to regulate which terms and conditions of employment host Member States must apply to workers posted on their territory.[429] After the ECJ *Rush Portuguesa* decision, secondary legislation was required to regulate this topic.[430] The Commission's first draft PWD aimed at ensuring legal certainty, the prevention of unfair competition as well as the protection of posted

427 Case 5/77 *Carlo Tedeschi v Denkavit Commerciale S.R.L.* ECLI:EU:C:1977:144; *Compassion in World Farming*; S Evans 'The Services Directive: (Too) Great Expectations?' in J van de Gronden (ed) *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?* (Wolters Kluwer, Alphen aan den Rijn 2009), p 10.

428 Hatzopoulos 2012a, p 222.

429 Directive 96/71/EC. The Directive therefore provides control for host Member States in relation to third-country nationals posted on their territory. See for an excellent and extensive overview: Houwerzijl 2005.

430 This chapter, par 3.4.2.

workers.[431] The negotiation process reveals a clear contrast between on the one hand liberalizing trade and on the other hand providing protection to workers on the basis of national labour law. The discussion surrounding a threshold in the duration of the service provision for the Directive to apply forms an excellent example of these conflicting interests. Without any threshold the Directive's provisions ensuring application of the host states core labour legislation would apply to any service provision, no matter the duration of the contract. According to the Commission and several Member States, this would go against the purpose of the Directive. On the other hand, a majority in the European Parliament, several Council members as well as labour unions resisted the application of a threshold.[432]

A compromise between these two aims was included in the adopted Directive. The Directive obliges host Member States to apply the core provisions of their national labour law to posted workers. The optional terminology concerning the application of host state legislation provided by the Court in *Seco*, and repeated in *Rush Portuguesa*, is replaced by the Directive in the form of an obligation.[433] However, the Directive clearly restricts the Court's ruling concerning the competence of Member States to apply their labour legislation or collective agreements. Moreover, the Directive is limited to a 'nucleus of mandatory rules for minimum protection to be observed in the host Member State by employers who post workers there'.[434] This nucleus of mandatory rules consists of:

(a) maximum work periods and minimum rest periods;
(b) minimum paid annual holidays;
(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
(e) health, safety and hygiene at work;
(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
(g) equality of treatment between men and women and other provisions on non-discrimination.[435]

431 Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services COM (1991) 230, final, p 6. See for the aims of this proposal: Explanatory Memorandum par 3, p 2.
432 Houwerzijl 2005, p 87-88.
433 *Seco*, par 14; *Rush Portuguesa*, par 18; Barnard 2013, p 379.
434 Directive 96/71/EC, recital 13.
435 Directive 96/71/EC, Article 3(1).

Both the threshold and the restriction of the application of labour law by the host state to the core provisions can be seen as restrictions to the Court's interpretation in *Rush Portuguesa*.[436] This restriction is also apparent from the Court's interpretation of the Directive itself provided in the *Laval* case. In *Laval* the Court provided a thorough explanation of the subject-matter of Directive 96/71/EC. The Court commenced with an analysis of Article 3(1) of Directive 96/71/EC which contains a list of terms and conditions of employment. Member States must make sure that undertakings from other Member States posting workers to their territory through one of the means of Article 1 apply the terms and conditions listed in Article 3(1) a to g, as they are laid down in that Member State to those posted workers. This provision therefore is an exception to the general principle applying to services, namely that the law of the home state applies.[437] This exception is unsurprising in the light of the case law which influenced its creation.[438] The Directive applies to undertakings established in a Member State which, in the framework of transnational provision of services, 'take one of the following transnational measures':

> (a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
>
> (b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or
>
> (c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.[439]

436 Houwerzijl 2005, p 88.

437 However, an exception to this rule can be found in Directive 96/71/EC, Article 3(7) in the situation where the worker involved enjoys more protection in the home Member State. Regarding the home state control principle see: Barnard 2013, p 240-241 and 362; see also the Opinion of AG Jacobs in case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd Opinion AG Jacobs* ECLI:EU:C:1991:72, par 23-24 and 27. That Opinion also discusses the right of Member States to prevent the circumvention of national law by operating from another Member State.

438 This chapter, par 3.4.2.

439 Article 1(1) and 1(3) Directive 96/71/EC read together.

These three methods of posting are referred to as: (a) the posting of workers, (b) intra-company (or intra-corporate) transfers[440] and (c) the hiring-out of personnel.[441] Note that Directive 96/71/EC does not harmonize the material content of the terms and conditions listed in Article 3(1) a to g of the Directive.[442] What the Directive does require is that the rules that apply in the Member State relating to the listed terms and conditions are applied by undertakings posting workers in that Member State as well. Thus equality between national workers and posted workers is required. Furthermore, the Directive does not harmonize systems for establishing terms and conditions of employment either. The Court explained that the Member States are free in their choice of transposing the Directive. It is irrelevant how they make sure that the minimum conditions listed in Article 3(1) a to g are applied to posted workers, as long as they apply equally to domestic and posted workers.[443]

In the *Laval* case, Swedish legislation consisted of a system which does not fit the optional methods provided for in the Directive and which does not provide for a minimum rate of pay. While this is not in conflict with the Directive, it does lead to the conclusion that the Directive cannot be relied upon to impose the adopted system (the system of negotiation on a case-by-case basis relating to the wages, coupled with a threat of collective action) to foreign undertakings posting workers in Sweden.[444] The Court indicated that the measures in question were not covered by the Directive, did obstruct the freedom to provide services and therefore require objective justification.[445] The Court reached a similar conclusion in *Rüffert*. In that case a conflict arose between the company Objekt und Bauregie and the Land Niedersachsen (Germany) which had awarded a public tender to that company. Objekt und Bauregie made use of a sub-contractor established in Poland which failed to comply with its contractual obligation to apply the collective agreement and the minimum wage laid down therein. The case revolved around the fact that the collective agreement at issue was not universally applicable as it had not been declared as such and only applied to the public sector.[446] Therefore, the wage level in

440 It is important to distinguish between intra-company transfers when dealing with service provision through the posting of workers and the separate issue of the proposed directive dealing with intra-company transfers of third-country nationals, see Commission proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer COM (2010) 378, final, recital 22.

441 See for instance: Tjebbes 2011.

442 Case C-490/04 *Commission v Germany* ECLI:EU:C:2007:430, par 18-19; *Laval*, par 60; case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others Opinion AG Mengozzi* ECLI:EU:C:2007:291, par 58.

443 *Laval*; case C-346/06 *Dirk Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189, par 24, 26, 28-29.

444 *Laval*, par 71. Note that the Court emphasizes the fact that it is not possible for Laval to know in advance which wages will apply, see more extensively: Tans 2008, p 258-259.

445 Tans 2008, par 5.5.

446 *Rüffert*, par 24, 26, 28-29.

the collective agreement was not a minimum wage and thus Objekt und Bauregie could not be forced to apply it to the workers posted by the sub-contractor.[447]

Member States can apply terms and conditions relating to public policy which are not listed in Article 1(3) by making use of Article 3(10). However, this has to be done expressly by the national authorities.[448] Consequently, Member States are in principle allowed to apply legislation or collective labour agreements to any person who is posted within their territory. These rules must be objectively justified and applied in accordance with the principle of proportionality. Applying legislation which objective is already observed in the home Member State will be deemed contrary to the freedom to provide services. Moreover, the home Member State rules must provide a significant additional protection for the posted workers, as the principle of proportionality requires that the hindrance to the freedom to provide services is proportional *stricto sensu* to the sought objective. In the scenario of the posting of workers as defined in Directive 96/71/EC Member States are obliged to apply their rules for minimum protection if they are included in the list of Article 3(1).

3.5.3.2 The Citizens Rights Directive

Directive 2004/38/EC, or the Citizens Rights Directive, codifies the rights that are corollary to the fundamental freedoms, the right to enter and reside in another Member State. As described, these rights are no longer exclusive to those exercising an economic activity as all EU citizens, as well as several of their family members,[449] now have general movement rights. The essence of the Directive is the granting of rights to leave and enter the Member States on the sole condition of demonstrating a valid identity card or a passport. As these rights are granted directly on the basis of Union law, a passport may only be used to verify nationality.[450] Residence rights are granted in three stages. The Directive provides a general right of residence for up to three months.[451] Residence for a period exceeding three months requires the Union citizen to be qualified. Performing an economic activity, or simply having sufficient resources and sickness-insurance for oneself and family members leads to such qualification. Several other capacities, such as being a student, or those no longer working due to illness or involuntary unemployment, also lead to a right of residence longer than three months. As for service providers, the right of residence relates to the status of being self-employed.[452] Finally, the Di-

447 *Rüffert*, par 31-35.
448 *Laval*, par 82-84.
449 This chapter, par 3.2.3 and 3.4.1.
450 Directive 2004/38/EC, Articles 4 and 5; *Wijsenbeek*, par 42, 44 and 45.
451 Directive 2004/38/EC, Article 6.
452 Directive 2004/38/EC, Article 7.

rective establishes a permanent right of residence for those that have resided legally for a continuous period of five years in the host Member State.[453]

Movement and equal treatment

Those who are economically active enjoy equality with nationals on the basis of nationality, as provided by the Treaty itself.[454] From a perspective of social security, the motivation lies in the fact that the economically active contribute to the economy of the host Member State. However, movement rights are no longer reserved to the economically active.[455] EU citizens using their movement and residence rights on the basis of EU law fall within the scope of the Treaty and therefore should enjoy equal treatment regarding nationality.[456] As specifically provided, the movement and residence rights for citizens are 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'.[457] As Directive 2004/38/EC requires either economic activity or sufficient resources these conditions limit the combination of EU citizenship with the general non-discrimination of Article 18 TFEU.[458] The Court has limited the application of these conditions as a ground to end or refuse residence for Member States in several ways.

Firstly, in *Baumbast* the Court ruled that these conditions must be applied 'in compliance with the limits imposed by [Union] law and in accordance with the general principles of that law, in particular the principle of proportionality'.[459] This judgment fits in the common approach of the ECJ that Member states are bound by the general principles of EU law when they act within the scope of Union law.[460] Secondly, despite the fact that applying for social benefits would provide evidence that the condition of having sufficient resources for support is not, or no longer, met, the ECJ allows legally residing non-economically active citizens to claim certain benefits in the host state, such as maintenance grants and loans for students or a child raising allowance.[461] The Court's argumentation is that by adopting movement and residence rights for non-economically active nationals of a Member State under the condition not to become an *unreasonable* burden on the public fi-

453 Directive 2004/38/EC, Article 16.
454 Articles 45, 49 and 56 TFEU.
455 This chapter, par 3.2.3.
456 Articles 21 and 18 TFEU. Case C-85/96 *María Martínez Sala v Freistaat Bayern* ECLI:EU:C:1998:217, par 59, 62 and 63; see extensively: Barnard 2005, p 1465-1489, and AP van der Mei 'Union Citizenship and the De-Nationalisation of the Territorial Welfare State' (2005) 7 *European Journal of Migration and Law*, p 203-211, in particular 207-211.
457 Article 21(1) TFEU.
458 Directive 2004/38/EC, Article 7(1) b and c, see also the Court's summary provided in *Trojani*, par 31-34.
459 *Baumbast*, par 91.
460 This chapter, par 3.6.
461 *Sala*, par 63; *Grzelczyk*, par 40-45, in particular, par 44; *Trojani*, par 43 and 44; *Bidar*, par 46 and 56.

nances of the host Member State,[462] 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States' was accepted.[463] This financial solidarity itself is also limited which demonstrates the Court's awareness of the Member States fears over 'social tourism'.[464] In essence, the Court requires the competent authorities to cary out an overall assessment 'of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned'.[465] This foregoes an automatic system of denial on the basis of a reference amount for the grant, yet it does allow a refusal of such grants if a non-economically active applicant does not have sufficient resources.[466]

Whereas the economically active are the beneficiaries of full equal treatment from the moment they reside in the host Member State, for the non-economically active equal treatment is based on the length of residence as well as the depth of integration into the society of the host state.[467] Therefore, non-economic migrants are subject to a gliding scale, the longer the period of legal residence and the more integrated the migrant is in the society of the host state, the more that migrant can rely on equal treatment. This gliding scale is also reflected in the CRD. Those staying up to three months do not have to perform an economic activity, they do enjoy equal treatment, but not regarding social assistance or student benefits. Those residing in another Member States continuously up to five years need to have sufficient resources or perform an economic activity. They enjoy equal treatment, including social assistance but not in respect of maintenance aid for studies if they are not workers, self-employed or family members of a worker or a self-employed person. Finally those who have continuously resided in the host state for five years no longer need to fulfil an economic activity and they enjoy equal treatment in respect of social assistance, including student maintenance, be it grants or loans.[468]

3.5.3.3 The Services Directive

The Directive on services in the internal market is one of the regulatory measures adopted in light of the Lisbon Strategy, launched by the Lisbon European Council

462 As was introduced by Directive 90/364/EC, Directive 90/365/EC and Directive 93/96/EC. Though Article 7 Directive 2004/38/EC does not include the word unreasonable, the preamble to the Directive does refer to 'an unreasonable burden', recital 16.

463 *Grzelczyk*, par 44.

464 A term indicating 'moving to a Member State with a more congenial social security environment', Barnard 2005, p 1489 using the term 'benefit tourism' and referring to: case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* Opinion AG Geelhoed ECLI:EU:C:2004:112, par 13 and 18.

465 Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* ECLI:EU:C:2013:565, par 76-78.

466 Case C-333/13 *Elisabeta Dano, Florin Dano v Jobcentrer Leizig* ECLI:EU:C:2014:2358, par 77-81.

467 *Bidar*, par 56 and 59; Barnard 2005, p 1488.

468 Directive 2004/38/EC, Article 24.

meeting in March 2000. The aim of this strategy was to ensure that the European Union would become the world's most competitive and dynamic knowledge-based economy by 2010.[469] The Services Directive entered into force on 28 December 2006. Despite its name, the Directive applies to service provision in general, irrespective of whether the provider conducts temporary cross-border services, or whether the provider wants to establish himself in a host Member State. The Directive required the Member States to check their national regulations relating to service provision and establishment of service providers on necessity. This screening exercise was to be performed on the basis of lists indicating which requirements are prohibited and which must be subject to an evaluation of necessity.[470] Furthermore, Member States were required to create a Point of Single Contact (PSC) which should provide information regarding all authorization requirements, both for service provision and for establishment of service providers.[471] The initial 2004 proposal[472] led to a fierce debate in particular focused on the topic of service provision. This debate is interesting as it reveals the troubled relationship between temporary service provision and legislation trying to safeguard the national interest of the host State. The consequence of this debate is that the deregulatory ambition in relation to free movement of services, of which the abandoned principle of home state control was the pinnacle, has weakened significantly. Moreover, concerns relating to the impact of the Services Directive, *inter alia* relating to social protection systems of Member States, have led to the exclusion of various service sectors and topics, resulting in a patchy legislative instrument.[473]

First draft

The essence of the first draft is similar to that of the final adopted Services Directive, a set of rules relating to establishment of service providers, rules relating to service provision and rules on mutual assistance, including a PSC. The rules on establishment and the PSC proved relatively unproblematic, but this was not the case for the rules relating to service provision. The main problem with the intended regime of the first draft was the introduction of the country of origin principle. The intention of that principle was to let service providers be subject to the regulations of the home state only. Thus this principle relies strongly on mutual recognition, be it that the proposal allowed for general and temporary derogations and

469 Lisbon European Council meeting, 23 and 24 March 2000, Presidency Conclusions, par 5; Directive 2006/123/EC, recital 4.
470 Directive 2006/123/EC, Articles 14-15 and 16(2).
471 Barnard 2008, p 323.
472 COM (2004) 2, final.
473 Craig and de Búrca 2015, p 850.

derogations to be applied on a case-by-case basis.[474] A related problematic topic concerned the posting of workers. The original proposal provided that Directive 96/71/EC would apply instead of the Service Directive, basically ensuring that the applying wages and conditions of employment listed in that Directive are covered by regulations of the host state.[475] Article 25 contained codification of case law concerning the posting of third-country nationals. However, the original Services Directive proposal would have removed the following administrative obligations:

- to obtain authorization from, or to be registered with, its own competent authorities, or to satisfy any other equivalent requirement;
- to make a declaration, other than declarations relating to an activity referred to in the Annex to Directive 96/71/EC which may be maintained until 31 December 2008;
- to have a representative in its territory;
- to hold and keep employment documents in its territory or in accordance with the conditions applicable in its territory.[476]

As a replacement for this loss of control the measures to reinforce administrative cooperation between states were increased, The Directive would require host states to trust assistance by the home states regarding the compliance with the employment and working conditions of the host state to be sufficient.[477] The loss of control for host states was considered unacceptable. In general, the proposal was feared to encourage social dumping, in particular in light of the 2004 enlargement with Eastern European States.[478] The criticism, in particular relating to social dumping, led to a new revised proposal.[479] The removal of the country of origin principle, as well as the removal of the provisions relating to the posting of work-

474 COM (2004) 2, Articles 17-19. The 23 general derogations mostly related to topics covered by existing or to be adopted directives such as the Posted Workers Directive and the Citizens Rights Directive. Other here relevant derogated topics were for example: services where the provider moves temporarily in order to provide his service covered by a total prohibition which is justified by reasons relating to public policy, public security or public health, and specific requirements of the Member State to which the provider moves, that are directly linked to the particular characteristics of the place where the service is provided and with which compliance is indispensable for reasons of public policy or public security or for the protection of public health or the environment. The three temporary derogations related inter alia to gambling services. Finally, the case-by-case derogations related to safety of services, including public health, the exercise of a health profession and the protection of public policy, notably protection of minors.

475 Directive 96/71/EC, Article 3(1).

476 COM (2004) 2, Article 24 (1).

477 Barnard 2008, p 329; COM (2004) 2, Article 24(2).

478 Evans 2009, p 7-8; Barnard 2008, p 329-330, who indicates resistance in particular from the European Trade Union Federation (ETUC) and France. See further chapter 4, par 4.3.4.

479 As indicated by the then Internal Market and Services Commissioner McCreevy in a speech held on 4 April 2006, all interaction between the Service Proposal and labour law had been removed. According to McCreevy the allegations of lowering social standards and threats to the European social model poisoned the debate. The removal of all provisions on labour law would allow the debate to move on, even though those allegations were wrong, Commissioner for Internal Market and Services, Statement on the Revised Proposal for the Services Directive, Speech/06/220, 4 April 2006, p 2.

ers (and provisions relating to healthcare) proved sufficient for acceptance. After some final changes the Services Directive was adopted and entered into force on 28 December 2006.[480] As the implementation time was three years, implementation of the Directive had to be concluded by the Member States by 28 December 2009.[481]

Country of origin principle

The heavy resistance to the country of origin principle and the loss of regulatory control reveals a tension between temporary service provision and legislation trying to safeguard the national interest of the host state, in particular those relating to the labour market. Clearly Member States are reluctant to yield regulatory control and do not have enough trust that other Member States will provide similar control.[482] The original proposal sought to address unnecessary authorizations and other formalities, and in particular those applying to service providers would have been more effectively addressed by the country of origin principle. Consequently, the Services Directive has lost effectiveness to address barriers to trade in services stemming from differences in regulatory frameworks between the Member States.[483] As noted by De Witte, this principle would have led to a substantive shift in comparison to the ECJ and the Commission's own earlier approach towards services liberalization. The ECJ requires the host Member State to take laws and regulations that apply to the service provider of the home Member State into account. The same holds true for the previous approach of the Commission when drafting internal market legislation. The country of origin approach assumes that 'regulatory competition' principally leads to the possibility to challenge regulations of the host state.[484]

The distinction between the freedom of establishment (in general) and the freedom of service provision is explained in case law by referring to the temporary nature of service provision. Establishment entails the exercise of business in another Member State by acquiring a stable infrastructure, indicating a shift of business to that other Member State. Service provision is considered to entail the temporary exercise of business in another Member State, thus the economic activity to another Member State will end after a certain period of time.[485] This view was nu-

480 Barnard 2008, p 331. The Council's common position further excluded some service activities, reduced the Point of Single Contact obligations and changing the implementation period to three years instead of two.

481 Directive 2006/123/EC, Article 44.

482 The debate surrounding regulatory control was in part rooted in differences in thinking towards regulation. The initial proposal was more based on the Anglo-Saxon model (deregulation and letting the market decide). However, the adopted version attempts to reconcile the Anglo-Saxon model with the Continental approach (interventionism by central government to protect consumers and workers), Barnard 2008, p 323.

483 Barnard 2008, p 323.

484 De Witte 2007, p 8.

485 Hatzopoulos and Uyen Do 2006, p 927 referring to: case *Commission v Germany* (205/84).

anced in *Gebhard* where the Court indicated that the acquisition of some permanent infrastructure in the host state would not automatically classify the economic activity under establishment, as the regularity, periodicity or continuity of service provision had a role to play as well.[486] As indicated by Hatzopoulos and Uyen Do, the temporary criterion seems to have been replaced by a more economic one. Reflecting the grown importance of services, the residual character of the freedom to provide services, originally defined in the Treaty as all economic activities not relating to goods, establishment or capital, seems to have shifted to a presumption in favour of service provision. Thus, the difficult dividing criterion of temporary nature is at least flanked by two additional criteria: a material criterion, the infrastructure set up by the service provider goes beyond what is strictly necessary for service provision; and an intentional criterion, the intention of the provider through that infrastructure 'to hold itself out to, amongst others, nationals of the second Member State'.[487] The economic conception forming the dividing line between the freedom to provide services and the freedom of establishment is based on the idea that the latter involves an indefinite move to another Member State, either in person, or in the form of a branch office or the shifting of the principal place of business. As such, establishment is more akin to the free movement of workers. Service provision does not entail an indefinite move; rather the natural or legal person involved does not have the intention to leave the home state indefinitely, though many services require proximity between provider and receiver which will require some form of movement.[488] Service provision may still be considered as such, even if the provider moves to a second Member State for years. Consequently, service provision relates closer to the free movement of goods.

This conceptual difference has led to the notion that service provision should primarily be regulated by the country of origin, since the provider does not intent to set up shop in another state. Contrary, establishment entails that the subject will become part of the economy of another state which leads to a shift in the primary regulatory framework from the home state to the host state (or better, the new home state).[489] The next paragraphs will examine to what extend the revised Services Directive requires the Member States to reduce barriers to the freedom of establishment, and in particular, the freedom to provide services.[490] To be clear, the substance of the Services Directive should have no impact on immigration laws and labour market regulations. Consequently, the implementation of this Directive will not be discussed in chapters five and six. However, considering the original in-

486 Gebhard, par 27.
487 Hatzopoulos and Uyen Do 2006, p 927 referring to: *Schnitzer*, par 32.
488 Chapter 2, par 2.3.5.1.
489 Barnard 2008, p 366.
490 As noted by Barnard, the Services Directive has suffered from the political debates surrounding it, losing clarity and focus. She points to repetitions and poor drafting as well as contradictions between the preamble and the provisions of the Directive, Barnard 2008, p 323-324.

tention and the horizontal application of the Directive, a study discussing services without addressing the substance of the Services Directive itself seems incomplete.

Scope

The definition of a service provided in Article 2(1) expressly refers to self-employed economic activity; the Directive therefore targets both service provision and establishment.[491]
Due to the exclusion of a range of sensitive topics, several commentators question the horizontal character of the Directive.[492] Excluded from the subject of the Directive are *inter alia* labour law, defined as any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Union law. Furthermore the Directive does not affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Union law. Social security legislation is exempted as well.[493] Article 2 excludes specific activities from the scope of the Directive including activities covered by several sector specific directives such as financial services and transport services. The field of taxation is exempted as are healthcare services and social services.[494] The Directive moreover does not alter the existing EU regime relating to services of temporary work agencies. Article 3 provides that in case of conflict between the Directive and another Union act relating to a service activity in specific sectors or for specific professions, the latter shall prevail. Several directives are listed including: Directive 96/71/EC concerning the posting of workers, Regulation 1408/71/EEC (replaced with Regulation 883/2004/EC) on the application of social security schemes, and Directive 2005/36/EC concerning the recognition of professional qualifications.

Article 4 containing the relevant definitions used for terms in the Directive refers to the Treaty. Therefore, former case law interpreting the scope of the fundamental freedoms, the justification grounds and matters such as competent authorities, still apply.[495] An important interpretative issue is the shift from the

491 Recital 87 of the preamble provides potential conflict by on the one hand indicating that it is up to the host Member States to define self-employed while simultaneously referring to the Union definition of a worker, Barnard 2008, p 332, fn 53. See regarding the definition of service and the question whether publicly funded services fall within the scope of the Directive: Barnard 2008, p 332-333.

492 Hatzopoulos 2012, p 258.

493 Directive 2006/123/EC, Article 1. Note that rules laid down in collective agreements do not fall within the definition of 'requirement' provided in Article 4.

494 See for the definition of healthcare and social services, and thus the scope of this carve-out case C-57/12 Fédération des maisons de repos privé de Belgique (Femarbel) ASBL v Commission communautaire commune de Bruxelles-Capitale ECLI:EU:C:2013:517.

495 Evans 2009, p 10; Directive 2006/123/EC, Article 4.

discrimination approach towards the market access approach.[496] The Services Directive does not provide which approach applies. Barnard suggests that the market access approach should prevail in general, while more extreme cases such as those addressed in the 9th recital should follow the discrimination approach (f.i. road traffic regulation).[497] This seems logical, in particular in particular in light of the specific referral to the Treaty provisions in Article 4 of the Directive which ensures the application of former case law. The Services Directive targets requirements affecting access to, or the exercise of, a service activity. Article 4 defines requirements as:

> any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organizations, adopted in the exercise of their legal autonomy

The broad definition of restrictions in the Services Directive could lead to problems and the preamble tries to formulate rules that are not to be considered restrictions:

> This Directive applies only to requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.[498]

As such, rules that apply to all, irrespective of nationality or the specific activity of the service provider have to be respected and do not constitute restrictions. The fact that a certain building is designated as residential cannot be challenged if a service provider intends to use it as office space on the basis of the Services Directive.[499]

496 This chapter, par 3.5.1.1.

497 Recital 9 and 65 of the preamble suggest a discrimination approach, while recital 69 and most substantive provisions of the Directive, such as Article 9(1) and 16(1) (containing the central provisions relating to establishment and services), point towards the market access approach, Barnard 2008, p 339-340. Evans concludes that the market access approach applies based on the text of Article 16(1), Evans 2009, p 13.

498 Directive 2006/123/EC, recital 9.

499 Nevertheless, drawing a line is not easy. The Commission addresses this issue in its Handbook indicating that the formulation of a rule is not conclusive, thus 'the actual effect of the requirements in question needs to be assessed to determine whether they are of a general nature or not', European Commission 'Commission's Handbook on Implementation of the Services Directive, Luxembourg: Office for Official Publications of the European Communities' (Office for Official Publications of the European Communities Luxembourg 2007), p 17. See for a more thorough discussion: Barnard 2008, p 337-339.

Main obligations and exceptions relating to service provision

Article 16 requires Member States to:

> respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

The remainder of the paragraph indicates that national requirements regulating services must comply with non-discrimination, necessity and proportionality. Article 16(2) lists specific prohibitions which can all be traced to existing ECJ case law. It is uncertain whether the Services Directive limits the grounds of justifications as developed by the Court. Article 16 refers to public policy, public security, public health and the environment. The Directive provides several justification grounds in Articles 16, 17 and 18. Article 16(3) contains exceptions relating to rules on employment conditions, including those laid down in collective agreements. Article 17 provides an extensive list of exceptions to article 16. Besides the above described exceptions based on coverage by specific directives already exempted by Article 3, a relevant exception relates to the posting of third-country nationals in the context of the provision of a service. Article 17 *inter alia* allows for the possibility for Member States to require visa or residence permits for third-country nationals who are not covered by the mutual recognition regime provided for in Article 21 of the Convention implementing the Schengen Agreement,[500] the possibility to oblige third-country nationals to report to the competent authorities of the Member State in which the service is provided on or after their entry) and requirements in the Member State where the service is provided which reserve an activity to a particular profession.

Finally, Article 18 contains case-by-case derogation possibilities in exceptional circumstances related to safety of services. However, these measures may only be taken in accordance with the mutual assistance procedure laid down in Article 35 and when the following conditions are fulfilled:

- the national provisions in accordance with which the measure is taken have not been subject to Union harmonization in the field of the safety of services;

500 Convention implementing the Schengen Agreement, Article 21 allows aliens holding a valid residence permit of a Member State to travel freely for up to three months within the territory of the other Contracting Parties. Note that the Schengen Convention has been incorporated into European Union law, see for a detailed account: P Boeles, M den Heijer, G Lodder and K Wouters European Migration Law (Intersentia, Antwerpen 2009), p 43.

- the measures provide for a higher level of protection of the recipient than would be the case in a measure taken by the Member State of establishment in accordance with its national provisions;
- the Member State of establishment has not taken any measures or has taken measures which are insufficient as compared with those referred to in Article 35(2);
- the measures are proportionate.

The mutual assistance procedure in essence entails a check by the home Member State of the service provider regarding the lawfulness of its operation. Moreover, the host Member State is required to demonstrate to the Commission why it considers the measures taken by the home Member State are insufficient to safeguard the safety of service provision. Coupled with Articles 17 and 18 the provision seems to reflect the express derogations and the objective justifications approach developed in the case law of the ECJ. This list *inter alia* prohibits: the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed and an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity. The exception provided in Article 16(3) relates to requirements justified for reasons of public policy, public security, public health or the protection of the environment. In order to be justified, these requirements need to fulfil the listed principles in Article 16(1). The provision also provides exceptions based on employment conditions, including those laid down in collective agreements. As noted by Evans, the set-up of Article 16 suggests exhaustive harmonization as any other conclusion would lead to a double standard of compliance. According to case law, in that scenario the justification grounds are limited to those provided in the EU measure.[501] As such, the Treaty justification ground contained in Article 52 and the case law concerning the open list of general interest exceptions (the rule of reason) are not available to justify requirements falling within the scope of the Services Directive.[502]

3.6 Enforcement of EU law

The obligations derived from primary and secondary Union law are enshrined in a well-established legal system which tries to ensure the implementation and effectuating of these norms in the national legal orders of the Member States.[503] This

501 *Tedeschi*; Barnard 2008, p 367; Evans 2009, p 10-11 and 15.
502 Evans 2009, p 15; Craig and de Búrca 2015, p 849; Hatzopoulos 2012a, p 265.
503 A thorough description with particular emphasis of the consequences for the Dutch legal order of this system can be found in Jans, Prechal and Widdershoven 2011.

system, sometimes referred to as European administrative law, provides the ground rules that need to be observed by the national judiciary and administration when they are confronted with Union law obligations. The development of this legal system has commenced with the ECJ cases concerning autonomy, supremacy and direct effect. The effectiveness of this legal system was enhanced with the development of the principle of Union law consistent interpretation and the principle of state liability. This development is ongoing, various cases as well as secondary law relate to the effective implementation and effectuating of Union law. Such obligations are, according to the ECJ, derived from the principle of sincere cooperation, now enshrined in Article 4(3) TEU. Examples can be found in obligations that require the Member States to make sure that an infringement of Union law must be effectively, proportionately and dissuasively dealt with, and that governmental authorities need to apply directly applicable Union law on their own account. Moreover, Union institutions and Member States, when acting within the scope of the Treaty, need to comply with general principles of Union law and human rights. Finally, various cases indicate that national law needs to provide effective remedies for those who are granted rights on the basis of Union law and want to effectuate them. Besides the implementing mechanisms and the available remedies, the European Commission has extensive powers to investigate possible breaches of obligations imposed on the Member States and may bring cases before the CJEU. [504] This paragraph will provide a rudimentary overview of the enforcement mechanism of EU law. While this mechanism is extensively described in numerous handbooks, a basic overview is useful here as it to a great extent explains the implementation of EU obligations into the national legal orders of its Member States.

3.6.1 Autonomy, supremacy, direct effect, indirect effect and state liability

The EU has powerful legal mechanisms which encourage Member States to comply with, and apply, Union law.[505] The ECJ has been of fundamental importance in defining the mechanisms that ensure the correct application of EU law by Member States. The supremacy of EU law over national law was not expressly provided in the original Treaties, though some provisions implied as much.[506] It was the ECJ, in the *Van Gend en Loos*, *Costa v ENEL* and *Simmenthal* cases that adopted the groundwork to ensure supremacy of EU law over national law, including national

504 See in general Article 17 TEU, Article 258 TFEU and Article 260 TFEU; for an extensive description of the infringement procedure see Craig and de Búrca 2015, chp 2.

505 E Guild 'Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union' in E Guild and S Mantu (eds) *Constructing and Imagining Labour Migration. Perspectives of Control from Five Continents* (Ashgate, Farnham 2011), p 208-209.

506 Examples are the fidelity principle, Article 5 EEC (Article 4(3) TEU) and the direct applicability of Regulations, Article 189 EEC (now Article 288 TFEU). In case 6/64 Flaminio Costa v ENEL ECLI:EU:C:1964:66 the Court relies on these provisions as a legal basis for its argumentation that Union law takes supremacy over national law.

constitutional law.[507] In the *Simmenthal* case the ECJ provided that the principle of supremacy of Union law should be enforced by national courts, calling upon them to 'set aside any conflicting provisions of national legislation, even if adopted subsequently'.[508] This principle forms the background for the adoption of the two main concepts that ensure the implementation of Union law, particularly when Member states fail to do so in their national legislation, direct effect and consistent interpretation.[509]

The *Van Gend en Loos* argumentation indicated that certain provisions of Union law could be directly relied on before national courts. This direct effect is ensured independent from the law of the Member States, exemplifying the Court's approach of the EU as an autonomous legal order.[510] In the *Reyners* and *Van Binsbergen* cases the Court recognised the direct effect of the provisions concerning the freedom of establishment and the freedom to provide services.[511] While the EEC Treaty only expressly addressed individuals directly through the competition provisions and through regulations,[512] the ECJ increasingly extended direct effect to less clear Treaty provisions, directives,[513] decisions addressing the Member States[514] and provisions in treaties between the Union and third countries.[515] The current position is that provisions of Union law will be accorded direct effect, provided that they are sufficiently precise and unconditional.[516] The two conditions entail that the provision of Union law does not leave room for genuine and real choices relating to the effectuating of the Union law provision.[517] Previously, doubt existed regarding a third condition, namely that direct effect required the provision in question to intend to confer rights on individuals. [518] However, as noted by Amtenbrink

507 Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; *Costa* v ENEL; case 106/77 *Amministrazione Delle Finanze Dello Stato Simmenthal* ECLI:EU:C:1978:49.

508 *Simmenthal*, par 21; case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* ECLI:EU:C:1991:320.

509 The topics of supremacy and direct effect form a case study in the PhD thesis of De Waele concerning judicial activism. De Waele indicates that though certainly important, these concepts are not as revolutionary as often claimed in the literature, making them part of a successful evolution instead of a revolution; HFCJA de Waele *Rechterlijk activism en het Europees Hof van Justitie* (Boom Juridische Uitgevers, The Hague 2009), chp 6, in particular p 152, 164-165; referring to: KJ Alter *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford University Press, Oxford 2001), p 17-20 for an overview of literature referring to these concepts as revolutionary.

510 F Amtenbrink and HHB Vedder *Recht van de Europese Unie* (Boom Juridische Uitgevers, The Hague 2013), p 145.

511 *Reyners; Van Binsbergen*.

512 Article 101 and 102 TFEU; Article 288 TFEU.

513 *Van Duyn*.

514 Case 9/70 *Franz Grad v Finanzamt Traunstein* ECLI:EU:C:1970:78.

515 Case 104/81 *Hauptzollamt Mainz v Kupferberg* ECLI:EU:C:1982:362, par 20-21.

516 *Van Gend en Loos*; *Van Duyn*; case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ECLI:EU:C:1976:65.

517 *Van Duyn*, par 6; Jans, Prechal and Widdershoven 2011, p 69.

518 See for instance case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7, par 25 which leaves room for doubt concerning this question.

and Vedder, recent case law does not seem to require an intention to grant rights for a provision of Union law to have direct effect.[519]

The consequence of direct effect is that such directly effective EU law provisions may be relied upon in front of a national court. Consequently, conflicting national measures need to be set aside by the national court.[520] Moreover, directly effective Union law also 'precludes the valid adoption of new national legislative measures to the extent to which they would be incompatible with Unio n provisions'.[521] Another important consequence of direct effect is that the administrative authorities of the Member State are obliged to apply directly applicable Union law on their own accord.[522] This has a strong effect regarding the implementation and effectuating of Union law in the national legal order.[523]

In addition to direct effect, the principle of Union consistent interpretation provides that domestic courts are obliged to interpret national law as far as possible in the light of Union law.[524] According to the Court consistent interpretation is inherent to the Treaty.[525] The Court explained that the legal basis for consistent interpretation was formed by the principle of sincere cooperation.[526] Later, the Court added that national courts need to apply consistent interpretation 'as far as possible'.[527] This entails that the national court is required to apply the methods to avoid conflicts between provisions of national law where national law conflicts with Union law.[528] Consistent interpretation has its limits, as is evident from the ruling that it needs to be applied as far as possible. As national law needs to be interpreted in light of Union law, elements of that law need to be connected with Union law. Phrased differently, the requirement is an interpretation exercise; the national court should not have to re-write national law. As indicated by the Court, the national court is required to do whatever lies within its jurisdiction.[529] Furthermore, consistent interpretation is limited by general principles of Union law, in specific the legal certainty and the legality principle.[530] Finally, a *contra legem* application of consistent interpretation stretches too far. National law must not be interpreted on the basis of Union law if that would lead to a different reading of the national rules.[531]

519 Amtenbrink and Vedder 2013, p 156.
520 *Simmenthal*, par 21.
521 *Simmenthal*, par 17.
522 Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* ECLI:EU:C:1989:256; case C-429/09 *Günter Fuß v Stadt Halle* ECLI:EU:C:2010:717, par 39-40.
523 Jans, Prechal and Widdershoven 2011, p 95-96.
524 Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153, par 26; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion* ECLI:EU:C:1990:395, par 7.
525 Joined cases C-397/01 to 403/01 *Pfeiffer and Others v Deutsches Rotes Kreuz* ECLI:EU:C:2004:584, par 114.
526 Article 4(3) TEU.
527 *Marleasing*, par 8.
528 *Pfeiffer*, par 116.
529 *Pfeiffer*, par 118.
530 Case 80/86 *Strafzaak v Kolpinghuis Nijmegen BV* ECLI:EU:C:1987:431, par 13.
531 Case C-105/03 *Criminal proceedings against Maria Pupino* ECLI:EU:C:2005:386; Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos* (ELOG) ECLI:EU:C:2006:443.

An interesting question is whether, as is the case with directly applicable Union law, the organs of the Member State need to apply consistent interpretation as well. This indeed seems to be the case.[532] As explained by Jans, Prechal and Widdershoven, there are sound arguments to indeed accept this premise. Firstly, consistent interpretation is derived from the principle of sincere cooperation. As consistently held by the Court, obligations derived from that principle apply to all organs of the state.[533] Furthermore, if state organs are not obliged to apply Union consistent interpretation, that would mean that they can decide contrary to Union law which then requires rectification by a national court, an approach that is both cumbersome and seems illogical.[534]

An important addition to the tools devised to effectuate Union law is formed by the principle of state liability. This principle was first established on the basis of the principle of sincere cooperation, in the *Francovich* judgment.[535] The Court ruled, on the basis of a failure to implement a Directive concerning financial guarantees for employees of employers facing insolvency, that Member States are obliged to cover damages suffered by individuals on the basis of their own breaches of Union law.[536] In *Dillenkofer* the CJEU provided a coherent summary of its existing case law concerning state liability and the conditions that need to be fulfilled to establish such liability.[537] State organs that can cause state liability when they breach Union law are the legislator,[538] the administration,[539] and the national courts.[540]

3.6.2 Ensuring the full effect of Union law

Union law is dependent on the national legal order to ensure the implementation of its rights and obligations. The court system of the European Union strongly relies on national courts to ensure that Union law is applied in the national legal order. However, questions related to the interpretation of Union law are for the

532 Case C-218/01 *Henkel KGaA* ECLI:EU:C:2004:88, par 60; Craig and de Búrca 2015, p 210.
533 Jans, Prechal and Widdershoven 2011, p 98; see for example *Von Colson and Kamann*.
534 Jans, Prechal and Widdershoven 2011, p 98-99.
535 Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECLI:EU:C:1991:428.
536 Francovich, par 31-37; joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* ECLI:EU:C:1996:79, par 39.
537 Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer, Christian Erdmann, Hans-Jürgen Schulte, Anke Heuer, Werner, Ursula en Trosten Knor v Bundesrepublik Deutschland* ECLI:EU:C:1996:375.
538 Be it through incorrectly transposing directives (*Francovich*) or as a consequence of autonomous legislation (*Brasserie du Pêcheur*). Under certain circumstances even actions by individuals can lead to state liability if that state does not effectively prevent such actions: case C-265/95 *Commission v France (Spanish Strawberries)* ECLI:EU:C:1997:595.
539 Case C-5/94 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* ECLI:EU:C:1996:205; this includes private undertakings exercising public authority: case C-63/01 *Samuel Sidney Evans v Secretary of State for the Environment, Transport and the Regions and the Motors Insurers' Bureau* ECLI:EU:C:2003:650.
540 Case C-224/01 *Gerhard Köbler v Republik Österreich* ECLI:EU:C:2003:513.

Court to decide. Otherwise the uniform application of Union law is endangered.[541] Thus the preliminary procedure enshrined in Article 267 TFEU provides nationals courts with the possibility (and obligation in last instance) to refer such interpretative questions to the CJEU. Furthermore, most Union rules require further action by the Member States regarding their implementation and effectuating, but also to ensure the enforcement of such rules, as well as effective sanctions when Union rules are breached.[542] Describing this so called integrated legal order and the shared administration between the Union institutions on the one hand, and the national authorities of the Member States on the other, falls beyond the scope of this work. However, a rough sketch of its functioning is important in understanding the effectiveness of EU implementation into national law.

The Member States enjoy both institutional autonomy[543] and procedural autonomy[544] to deal with the implementation and effectuating of Union law unless otherwise provided specifically in the norm of Union law. No real limits are placed on the institutional autonomy.[545] However, the Court has placed limits on the procedural autonomy of the national Member States. The Court provided in the *Rewe* case that the principles of effectiveness and equivalence form the minimum requirements for national procedural law. The principle of equivalence entails that the conditions determining jurisdiction of national courts and the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have 'may not be less favourable than those relating to similar actions of a domestic nature'.[546] The principle of effectiveness, which applies regardless of the principle of equivalence,[547] states that the procedural rules may not make it 'impossible in practice to exercise the rights which the national courts are obliged to protect'.[548] This jurisprudence is not limited to procedural law. In the *Greek Maize* case the Court provides that enforcement of Union law and sanctions following breaches of Union law need to be effective, equivalent, dissuasive and proportionate.[549] These last two conditions indicate that sanctions need to be suffi-

541 Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.

542 Jans, Prechal and Widdershoven 2011, p 15-19 and chapter 8.

543 Joined cases 372/85 and 374/85 *Ministère public v Oscar Traen and others* ECLI:EU:C:1987:222; Case C-8/88 *Commission v Germany* ECLI:EU:C:1990:241; Case C-359/88 *Criminal proceedings against E. Zanetti and others* ECLI:EU:C:1990:148.

544 Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* ECLI:EU:C:1976:188.

545 Jans, Prechal and Widdershoven 2011, p 16-17.

546 *Rewe*, par 5; case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* ECLI:EU:C:2007:163, par 43; see also: case C-326/96 *B. S. Levez v T. H. Jennings (Harlow Pools) Ltd.* ECLI:EU:C:1998:577. As to what constitute 'similar actions' see: case C-261/95 *Rosalba Palmisani v Istituto nazionale della previdenza sociale* (INPS) ECLI:EU:C:1997:351.

547 Case 199/82 *Amministrazione delle Finanze dello Stato v San. Giorgio S.p.A.* ECLI:EU:C:1983:318.

548 *Rewe*, par 5; *Unibet*, par 43.

549 Case C-68/88 *Commission v Greece (Greek Maize)* ECLI:EU:C:1989:339; see extensively: Jans, Prechal and Widdershoven 2011, p 37-43.

cient to dissuade breaches of Union law[550] but not too high as to infringe the principle of proportionality.[551] Finally, the principle of judicial protection entails that all rights granted to individuals on the basis of Union law, in principle need to be enforceable at a national court.[552] This general principle has specifically led the Court to require certain remedies to effectuate Union law to be available in the national legal order.[553]

3.7 Analysis and conclusions

The European integration project is intended to ensure peace by replacing protectionism and economic competition with international cooperation. The main method to achieve this is the creation of an internal market, which includes the freedom to provide services on a level playing field with domestic service providers. This requires the abolishment of barriers to trade. Negative integration has moved from non-discrimination to the market access approach, where any measure liable to hinder service trade is suspect and requires a justification to escape infringing Article 56. This approach is limited as it is impossible to reach similar conditions of competition without positive integration. As such, the activity of service provision is subject to a wide reaching set of secondary legislative acts. Migration aspects relating to service provision for EU nationals is fully harmonized, and the Services Directive now regulates market access on a horizontal basis. Additionally, various service sectors are subject to specific directives.

EU law increasingly addresses non-EU nationals. Workers, including third-country national workers legally employed in the home Member State and transition citizens, do not gain access to the labour market in the host state if they are posted to perform a service contract in the host Member State for their employer. As service provision is temporary by nature, these workers will return to the home state after finishing the contract. Consequently, the freedom to provide services applies to these situations, which means that restrictions must be justified. As is clear from the Court's case law, restrictions should take the form of simple prior-

550 As such, the sanction of 7.20 Deutsche Mark in the *Von Colson and Kamann* case was not considered effective or dissuasive, *Von Colson and Kamann*, par 24 and 28.

551 As was the case in case C-29/95 *Eckehard Pastoors and Trans-Cap GmbH v Belgian State* ECLI:EU:C:1997:28, par 24-26.

552 Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* ECLI:EU:C:1986:206; Unibet, par 37.

553 The availability of interim relief, case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* ECLI:EU:C:1990:257, par 21; *Unibet*, par 67. Note that interim relief may also be granted against decisions implementing Union law if the Union norm itself is possibly in conflict with (higher) Union law, see joined cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Soest* ECLI:EU:C:1991:65; case C-465/93 *Atlanta Fruchthandelsgesellschaft mbH and Others (1) v Bundesamt für Ernährung und Forstwirtschaft* ECLI:EU:C:1995:369. See extensively: Jans, Prechal and Widdershoven 2011, p 320-327; review of definitive decisions, see case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* ECLI:EU:C:2004:17.

information obligations with very few administrative formalities with the intention to check the legality of the posting. This also applies to posting in the form of hiring-out. However, hiring-out may be fully restricted in the form of, for example, a work permit obligation, by a Member State in relation to transition citizens, provided that the Act of Accession includes the right to restrict access to the labour market to prevent disturbances due to mass influx of these transition citizens. The concept of the posting of workers provides derived mobility rights for non-EU nationals, a concept which is sensitive and leads to discomfort in certain Member State as it directly impacts on the autonomy to regulate access for third-country nationals. Moreover, service provision leas to fears relating to social dumping, which in turn has led to case law, and later Directive 96/71/EC obliging Member States to impose their minimum labour conditions to posted workers. Additionally, various directives now specifically regulate rights of third-country nationals, either in the form of protection of migrants legally entered on the basis of national law, and to a limited extend in the form of primary access to an EU Member State.

All these rights and obligations are embedded in a well-developed implementation and enforcement mechanism. The three main mechanisms ensuring the effectuating and implementation of Union law are consistent interpretation, direct effect and the principle of state liability. These three mechanisms tend to provide those that were granted rights on the basis of Union law with the possibility to effectuate that right through a national court, or at the least, to be covered for damages resulting from the breach of such rights. Consistent interpretation provides a simple solution to remedy a conflict between national and Union law. If possible, the national court (and possibly the administration) must interpret relevant national law in such a manner that the conflict no longer arises. Consequently, the individual claiming his or her right, is provided with that right. Within the limitations of the provision being sufficiently clear and unconditional, an individual can exercise his or her right provided on the basis of Union law, as conflicting national law must be left aside by the national law. As consistent interpretation and direct effect are bound to certain conditions, it may be that these principles leave the individual claiming his or her right provided on the basis of Union law empty-handed. Nevertheless, in such scenarios the Member State is liable for the damages that arise due to its own breach of Union law.

Chapter 4

The WTO and the EU, similarities and differences in services mobility liberalization

4.1 Introduction

EU law has led to a much wider and deeper level of service trade liberalization than is so far achieved under World Trade Organization (WTO) law. A comparison between these two legal orders is therefore useful from the perspective of state incentives to address service trade liberalization. States demonstrate reluctance to accept the consequence of service trade liberalization in the form of service mobility. This reluctance was partly overcome within the EU legal order. This chapter will compare the WTO and the EU to investigate the perceived incentives and reluctances related to service trade liberalization from two different, but comparable angles.

The historic overview of the creation of the WTO and the coming about of the Single European Act demonstrates an interesting parallel of economic and political interests that changed both legal orders. Globalization and the 'discovery' of international services trade has led to a ground-breaking increase of the international legal trade framework covering trade in services. At the WTO level the General Agreement on Trade in Services forms an ambitious multilateral agreement to facilitate trade in services by reducing existing barriers on a reciprocal basis.

Similarly, the 'completion of the internal market', secondary legislation and the case law of the European Court of Justice resulting in the 'market access' approach has a strong impact on reducing barriers to services trade.[1] Completing the internal market is an ongoing legislative ambition within the EU, be it that the rhetoric was replaced with the intention to lead the European Union to become the world's most competitive and dynamic knowledge-based economy by 2010.[2] The Europe 2020 strategy refers to an 'economy based on knowledge and innovation'.[3] The draft Services Directive would have led to a stricter approach, as the country of origin approach assumes that 'regulatory competition' principally leads to the possibility to challenge regulations of the host state.[4] Currently, the abolition of that principle entails that both the ECJ and secondary legislation is based on the market access approach.

As indicated by Gaines, Egelund Olsen and Sørensen, 'the unusual alignment of economic forces and political interests' that led to the increased liberalization of services trade in both legal orders has clearly passed. They express (in 2012) that we are in a time of continuing consolidation of this increase.[5] Regarding GATS Mode 4, I am less optimistic. Once commitments start to encroach on the sovereignty of a state, in particular when it comes to sensitive issues such as labour law regulations and immigration, the national response is to 'insert discretionary control into the process, where possible, or to place administrative hurdles in the way of exercise of the new rules which render them ineffective'.[6] The process of consolidating the agreed new rules and methods to liberalize international trade in services will hold true for the EU which has a strong mechanism to prevent Member States from breaching these rules. Importantly, all economic operators generally have the right of judicial protection whenever their interests are at stake due to breaches of EU law. Furthermore, the EU has a comprehensive legal framework.[7]

1 Chapter 3, par 3.1.5; chapter 3, par 3.5.1.1.

2 Lisbon European Council meeting, 23 and 24 March 2000, Presidency Conclusions, par 5; Directive 2006/123/EC, preamble par 4.

3 European Commission 'Communication from the Commission, Europe 2020, A Strategy for Smart, Sustainable and Inclusive growth' COM (2010) 2020, final, p 5.

4 Chapter 3, par 3.5.3.3; B de Witte 'Setting the Scene: How did Services get to Bolkestein and Why?' (2007) 20 European University Institute Working Papers, available online at: <http://cadmus.eui.eu/bitstream/handle/1814/6929/LAW_2007_20.pdf?sequence=1> (last visited 1 October 2015), p 8.

5 SE Gaines, B Egelund Olsen and KE Sørensen 'Comparing Two Trade Liberalisation Regimes' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press Cambridge 2012), p 5.

6 E Guild 'Primary Immigration: The Great Myths' in E Guild and C Harlow (eds) *Implementing Amsterdam, Immigration and Asylum Rights in EC Law* (Hart Publishing, Oxford 2001), p 91. Guild describes this tendency in 2001. Studying the current political climate in the Netherlands and the United Kingdom and the continuing tightening of rules, not least through administrative hurdles, leads to the conclusion that this tendency has grown worse, chapter 5, par 5.5; chapter 6, par 6.5 See also LR Dawson 'Labour Mobility and the WTO: The Limits of GATS Mode 4' (2013) 51:1 *International Migration*, p 5.

7 This framework greatly facilitates the implementation and effectuating of EU law. The concepts of direct effect, consistent or harmonious interpretation and state liability, as well as supremacy of EU law are extensively described in P Craig and G de Búrca *EU Law. Text, Cases and Materials* (Oxford University Press, Oxford 2015), chapters 7-9. The significance of this EU framework in comparison to the WTO framework is pointed out by →

Finally, the ECJ will have to clarify the meaning of the provisions of the Services Directive which may lead to a further dismantling of the existing barriers to services trade.[8]

The GATS faces different hurdles. As is apparent when studying the Doha Round negotiations, the political will to liberalize trade in services, in particular when connected to movement of natural persons, has indeed diminished greatly. In contrast with judicial protection provided in EU law, only WTO Members have the possibility to challenge other Member's measures. To a large extent, this entails that the interest of service providers at the multilateral level must be safeguarded by lobbying, particularly by stakeholders at the national level. This is troubling considering the topic here under discussion as GATS Mode 4 service providers, be it with important exceptions pertaining to forms of movement sought by larger enterprises, lack organized lobbying by economic forces. In relation to larger enterprises this moreover leads to the situation where (branches of) these companies are lobbying against their own state to prevent breaches of adopted Mode 4 commitments.[9] In terms of dispute settlement, these companies should then lobby the home state of Mode 4 service suppliers.[10] Moreover, the legal framework of the GATS is unfinished and the substantive rules that are complete leave room for ambiguity.[11] Worse, the administrative detail of the commitments is limited to general remarks (or lacking altogether) which additionally suffer from inconsis-

HZ Schroder *Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law* (Kluwer Law International Alphen aan den Rijn 2011), p 170, referring to F Veggeland 'Trade Facilitation through Equivalence and Mutual Recognition: The EU Model' (2006) 3 NILF Report (Oslo Norwegian Agriculture Economics Research Institute 2006) at 1; chapter 3, par 3.7.

8 These barriers were identified in Commission publications with the intention to convince Member States of the need to regulate this matter. They should therefore be read with caution; see in relation to the SEA: European Commission White Paper 'Completing the Internal Market' COM (1985) 310 final, 14 June 1985, p 19-20; P Cecchini, M Catinat and A Jacquemin *The European Challenge 1992 – The Benefits of a Single Market* (Wildwood House, Aldershot 1988), in particular chapter 6 concerning service sectors; European Commission 'Communication of the Commission to the European Council Action Plan for the Single Market' CSE (1997) 1, Final; European Commission 'Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services' COM (2002) 441, final.

9 Chapter 2, par 2.6.3.

10 Interviews by the author held with multinational companies clarify that offices of such companies are hindered by national immigration and labour market policies, interview CapGemini NL (3 December 2010). In the UK CapGemini provides an example of a company bringing Indian workers over to work in the UK. At the time of the interview this company was not relying on the entry route implementing GATS Mode 4 into UK law, yet does form an example of the type of movement addressed in Mode 4, interview CapGemini UK (20 May 2011). Additionally, in the Netherlands representatives of 25 multinational companies established in the Netherlands meet in the form of a contact group. This group discusses inter alia legal issues in relation to aliens. Such groups may effectively lobby governments in relation to Mode 4 commitments, interview CapGemini NL (3 December 2010).

11 Chapter 2, par 2.5.4.2. See regarding the complex and often unclear interaction between the substantive GATS provisions concerning market access, national treatment and domestic regulation S Tans 'The GATS Approach Towards Liberalization: The Interaction between Domestic Regulation, Market Access, National Treatment and Scheduled Commitments in the GATS' (2009) Centre for Trade and Economic Integration Working Paper 111, in particular part 3, available online:
<http://graduateinstitute.ch/home/research/centresand/programmes/ctei/working_papers.html> (last visited 1 October 2015).

tency between the schedules. This greatly facilitates the tendency to create administrative hurdles at the national level.[12]

4.2 Aim

A legal comparison of WTO law with EU law should be exercised with caution, due to differences between these international organizations. A comparative study of the WTO and the EU requires objective statements derived from two distinct regimes.[13] Irwin and Weiler emphasize the different *telos* and the equally different economy of the WTO and EU founding treaties, while simultaneously emphasizing the instructiveness of comparisons.[14] Gaines, Egelund Olsen and Sørensen question whether, from a trade liberalization perspective, these legal orders are really culturally distinct.[15] Without ignoring the differences in development, structure, ambition and the relationship between these legal orders and their Member States, they indicate that a comparative analysis is useful if the exercise takes place in the sphere of trade liberalization and with the use of the comparative law principle of functionality.[16] Zweigert and Kötz explain this as follows:

> The basic methodological principle of all comparative law is that of *functionality*. (...) Incomparables cannot usefully be compared, and in law the only things which are comparable are those which fulfil the same function.[17]

Applying this principle to the topic of this chapter would lead to the central question: how do EU and WTO law liberalize service mobility. As an example of the need for this emphasis on functionality, the EU market access approach, as developed by the ECJ, is comparable to the WTO Disciplines on Domestic Regulation, which only becomes apparent when we realize that both concepts aim at balancing the fundamental dichotomy in trade liberalization: how should the balance be-

12 Chapter 5, par 5.3.5-5.3.7; chapter 6, par 6.3.8.

13 Gaines, Egelund Olsen and Sørensen 2012, p 6; see also: J van de Gronden 'The Freedom to Provide Services' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press Cambridge 2012), p 256.

14 DA Irwin and J Weiler, 'Case Comment. Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7:1 *World Trade Review*, p 101. Examples of studies comparing these international legal orders from the perspective of temporary service provision are: E Guild 'Mode 4 and the EU: EU Free Movement of Services and Member State Powers on Immigration' (2008) Quaker United Nations Office Programme on Labour Mobility Briefing Paper and D Persin, 'Free Movement of Labour: UK Responses to the Eastern Enlargement and GATS Mode 4' (2008) 42:5 *Journal of World Trade*.

15 Gaines, Egelund Olsen and Sørensen 2012, p 6.

16 Gaines, Egelund Olsen and Sørensen 2012, p 7, referring to K Zweigert and H Kötz *An Introduction to Comparative law* (Oxford University Press, Oxford 1998). Note that their referral contains an error (as they refer to page 1977). The right page numbers explaining the principle of functionality are p 34-42.

17 Zweigert and Kötz 1998, p 34.

tween regulatory autonomy and trade liberalization be struck.[18] When studying the origins of the World Trade Organization and the European Union, it is clear that these international legal trade orders share a common ancestry. Economic, monetary and political tensions were the root of both World Wars. The international reaction to the atrocities of war was the signing of treaties and the creation of international organizations. These organizations were to address interstate tensions through cooperation and integration.[19] The WTO forms the multinational answer to protectionism as it addresses the economic tensions that rise between states without cooperation. The monetary tensions are addressed by the International Monetary Fund and the political tensions are the subject of the United Nations. The WTO thus has a political peace-keeping agenda, yet this political aim revolves around the reduction of barriers to trade as a means to achieve its political goal.[20] This aim therefore falls short of political integration.

The blueprint of the regional integration project that would ultimately lead to the EU was different.[21] The aim of the EU lies notably further, and not only as that organization incorporates monetary and labour market integration as well.[22] The EU strives towards international cooperation, the suppression of political conflict and the end goal can be found in some form of collective government.[23] The Schuman Plan formed the blueprint for the European Coal and Steel Community and its drafter, Jean Monnet, foresaw that political integration, which at the time proved to be too much for Member States that feared the loss of sovereignty, would only be reached through a longer road based on economic integration. As such, sectoral integration formed the opening move leading to the long term goal of a common economic market and ultimately political union.[24] The European integration project, starting with the ECSC, was 'to substitute for historic rivalries a fusion of [the Member States] essential interests; to establish, by creating an economic

18 See further this chapter, par 4.3.3.

19 See also: SE Gaines and BE Olsen 'Trade and social objectives' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press Cambridge 2012), p 203.

20 Gaines and Olsen 2012, p 203.

21 See for a comparison of the objective and purpose of the EU and the WTO in general, MM Slotboom *Do Different Treaty Purposes Matter for Treaty Interpretation? A Comparison of WTO and EC Law* (Cameron May, London 2005), p 58.

22 Goods, services and establishment are part of the WTO Agreement, however, labour market integration and economic and monetary union are not. Competition law under EU law is moreover thoroughly developed.

23 Gaines and Olsen 2012, p 203. What this 'end goal' should be is subject to, consistently returning, and heavy debate. Central in this debate is the question whether the EU ultimately should merge into a federation, be it with a substantial degree of decentralised autonomy for the constituting Member States. A federal Europe certainly was the ultimate aim of the architect of European integration, Jean Monnet, see extensively: M Burgess 'Federalism and Federation' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007) , p 70-71. A discussion of this topic, and an overview of the different end stages of the EU falls beyond the scope of this project. On this topic see: Burgess 2007, p 69-84 and A Warleigh-Lack 'Conclusion: The Future of the European Union' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007) , p 441-454.

24 Urwin provides an excellent insight to these opening moves, DW Urwin 'The European Community: From 1945 to 1985' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007), p 18-19.

community, the foundation of a broad and independent community among peoples long divided by bloody conflicts; and to lay the bases of institutions capable of giving direction to their future common destiny'.[25] The preamble to the TEU contains various references to economic, monetary and political common policies and indicates the aim 'to continue the process of creating an ever closer union among the peoples of Europe'.[26] Though history certainly did not smoothly follow these intentions, currently all three forms of cooperation, economic, monetary and political, are all, to a greater or lesser extent, part of one supranational organization, the European Union.

When considering the function of the rules dealing with service provision, both legal orders strive towards equal competition for service providers from a regulatory perspective.[27] Comparing the WTO Agreement and EU Treaty preambles verifies that the aim is to reduce barriers to trade in order to reach this level playing field for national and international competitors.[28] The process towards trade liberalization is far more advanced within the European legal order when compared to the WTO legal order. Whatever the current status in aspiring towards the abovementioned historical aims of these Treaty regimes, this aim lies at the heart of both international legal orders. There is a clear difference between the expressed ambitions regarding services in general and mobility to allow temporary service provision in specific, and the actual level of trade liberalization reached and currently offered in the WTO negotiations. Studying the EU's (and other WTO Members') existing Mode 4 commitments and the current offer in the Doha Round demonstrates that progress in the WTO area currently is so modest that it becomes questionable whether the mentioned aim is actually sought.[29]

25 Treaty constituting the European Coal and Steel Community, preamble.

26 Treaty on European Union, preamble. The current level of integration includes the internal market, an increasing level of monetary integration and a single currency, and various common political policies related to security and external relations. Classical national prerogative policies such as immigration, police matters and the judiciary are all to a lesser or greater extent part of the EU policy areas.

27 See also: R Howse 'Interpreting the GATS Arrangements on Telecoms' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press Cambridge 2012), p 451. From a regulatory perspective only, as for instance rules on competition are not fully part of the GATS framework.

28 The EU aims at the establishment of an internal market where the factors of production can freely cross borders without distortion of competition, Articles 3 TEU and 26 TFEU. The preamble of the WTO Agreement indicates the aim to contribute to: 'substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.' See also: T Cottier and M Oesch 'Direct and Indirect Discrimination in WTO and EU law' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press Cambridge 2012), p 146.

29 Chapter 2, par 2.4.3 and 2.5.4.2.

4.3 The method of the EU and the WTO to reach a level playing field

The underlying rationale of both international agreements, economic integration, is also apparent from the adopted method, preventing protectionism through the liberalization of international trade. As noted by Gaines, Egelund Olsen and Sørensen, the WTO and EU foundation is similar: 'the economic theory that mutual welfare benefits accrue to both parties in cross-border exchanges based on comparative advantage'.[30] The method adopted to achieve this is non-discrimination which allows economic actors to benefit from their economic strength without state measures eliminating these benefits through protectionism.[31] This aim is facilitated by deregulation[32] as well as Harmonization and mutual recognition.[33] Regarding services liberalization, the GATS contains two types of obligations, general obligations that are always applicable and specific obligations that only apply insofar as Member States have inscribed commitments. WTO Member States must observe the general obligations, such as the provisions concerning transparency and Most-Favoured-Nation treatment, even if they have not inscribed commitments. As an example, to protect the rights granted to service providers on the basis of the GATS, WTO Members must ensure independent judicial, arbitral or administrative tribunals or procedures providing review and appropriate remedies against administrative decisions affecting trade in services. This obligation applies irrespective of inscribed commitments.[34] Additionally, GATS commitments can lead to the application of the market access or national treatment obligation, or they may lead to the application of both. Article VI paragraphs 1, 3, 5 and 6 GATS targets non-discriminatory impediments to services provision of a regulatory or administrative nature. Whether the application of these paragraphs of Article VI requires commitments under both XVI or XVII GATS, or whether a specific commitment in one domain is enough, is unclear. In the absence of clarity provided by WTO dispute settlement my assumption is that a specific commitment under Article XVI or XVII leads to the application of Article VI. As Article XVIII (additional commitments) is included in the specific commitments part of the GATS this assumption is extended to that provision as well.

30 Gaines, Egelund Olsen and Sørensen 2012, p 6; they refer to the work of PB Kenen *The International Economy* (Englewood Cliffs Prentice-Hall 2000) as a standard work explaining the theory of comparative advantage.

31 Gaines, Egelund Olsen and Sørensen 2012, p 6.

32 Confusingly, deregulation under EU law is achieved through negative integration due to the adoption of the 'market access' approach, which basically indicates that any regulatory measure hindering trade is suspect and must be justified. Within the GATS, the market access provision targets discriminatory measures on 'import of services'. It is the domestic regulation provision, and in particular when Disciplines on Domestic Regulation are adopted including a necessity test, that amount to deregulation. Chapter 2, par 2.5.1.3 and 2.5.4.2, chapter 3, par 3.5.1.1.

33 Howse 2012, p 451.

34 Article VI(2) GATS. Chapter 2 par 2.5.2. See extensively: Tans 2009, part 3.

Thus scheduling a measure triggers the application of Article VI, however, only insofar as commitments are scheduled under each of these three provisions.[35] Concluding, the WTO method towards service trade liberalization is a mix of general obligations, publication and notification requirements concerning measures affecting trade in services, the creation of information contact points for developing country Members and ensuring objective judicial review. The specific obligations are adopted voluntarily by Members. Consequently, the opening of services markets itself depends on the success of negotiations, a factor enhanced by the MFN obligation. The adopted approach thus allows each Member to set its own pace towards liberalizing trade in services.

The EU internal market (at least legally) already provides full market access for the factors of production. With few exceptions, such as the exclusion of services provided in the context of official authorities,[36] the main rules and obligations apply to service provision in general. In GATS parlance, all modes of supply and almost all service sectors are subject to the liberalization of the internal market provisions. Consequently, there is a clear difference between the scope of the GATS, which is increased gradually and EU freedom of movement for service providers, which takes full market access and non-discrimination, with a few carve-outs, as its starting point. These approaches are often referred to as a bottom-up approach, indicating that each Member provides the extent of liberalization it agrees to for each sector, and a top-down approach, which indicates that the liberalization provisions apply in general. This difference is unsurprising given the timeframe during which each trade regime has strived towards the opening of service markets. Moreover, the EU constitutes a regional integration project; it is much easier to overcome obstacles to economic integration at a regional level. The differences between the EU Member States, be it economically in terms of labour standards, culturally or political, are exacerbated at the WTO level, to which most states in the world are Members. It is easier to reach agreement concerning trade liberalization between the Netherlands and Italy than between the Netherlands and China.[37] Naturally, the number of states participating to each legal order differs significantly as well. After the 2013 enlargement, the EU consisted of 28 Member States, whereas WTO negotiations are conducted between 161 Member States since the accession of the Seychelles on the 26th of April 2015.[38]

35 Chapter 2, par 2.5.1.

36 Article 51 TFEU, which applies to the freedom to provide services on the basis of Article 62 TFEU.

37 As an example: Marchetti and Mavroidis indicate that countries demonstrate specific preferences in their choice of partners when concluding mutual recognition agreement within the meaning of GATS Article VII(2). They conclude that countries demonstrate a clear preference for signing such agreements with trading partners in the same region or with trading partners speaking the same language, JA Marchetti and PC Mavroidis 'Mutual Recognition Agreements in the GATS' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press Cambridge 2012), p 434-439.

38 See the WTO website under the heading 'WTO Membership': <www.wto.org> (last visited 1 October 2015).

4.3.1 Non-discrimination and market access

Both legal orders are primarily based on the principle of non-discrimination; measures which do not comply with the provisions ensuring non-discrimination must be exempted on the basis of a public interest. Phrased differently, the WTO and the EU provide the right to pursue economic activities in another Member State 'under the same conditions as are imposed by that State on its own nationals', unless a specific exemption applies.[39] The foundations of the EU internal market are formed by the discrimination prohibitions constituting the four freedoms. The WTO method striving towards the above described aim is the principle of progressive liberalization to be reached through negotiations. The commitments sought are offered on the basis of reciprocity, with non-involved WTO Members benefiting from MFN treatment. Negotiations relating to commitments are held on the basis of the single undertaking approach, a negotiation round continues until all WTO Member States agree on the outcome.[40] Providing access and equal competitive conditions for foreign service suppliers under the GATS is spread out over two provisions, Article XVI concerning market access and Article XVII concerning national treatment. WTO Members may gradually choose to provide access via a specific mode of supply to a particular service market. Committing to market access entails that the main instruments of protectionism, the list provided in Article XVI, may no longer be imposed. It is possible to partially commit to market access, thus limiting liberalization to one or more of the listed measures. An Article XVI commitment leads to the possibility to compete on the host state market but not on the basis of equality. In order to effectively provide access to the domestic market, a commitment under Article XVII is required as well. A full national treatment commitment (which automatically entails a full market access commitment as well, as the listed measures are forms of discrimination) constitutes the equivalent of Article 56 TFEU. Non-discrimination captures both *de jure* (direct/ overt) and *de facto* (indirect/covert) discrimination in both legal orders.[41] While *de jure* discrimination entails a distinction made on the basis of nationality, *de facto* discrimination is based on the application of other criteria of differentiation (language, place of residence) that factually lead to the same result.

Within the EU legal order, the non-discrimination concept has evolved through judgments of the ECJ and is interpreted to entail a prohibition on unjustified bar-

39 See the language used in: case C-113/89 *Rush Portuguesa Lda mot. Office national d'immigration* ECLI:EU:C:1990:142, par 11.

40 Chapter 2, par 2.5.4.1

41 Confirmed in relation to the GATS by the Appellate Body in *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)* WT/DS27/AB/R, 25 September 1997, par 233. For the EU non-discrimination provisions, see for instance: case 152/73 Sotgiu v Deutsche Bundespost ECLI:EU:C:1974:13, par 11. See also Cottier and Oesch 2012, p 146.

riers to trade, including non-discriminatory barriers.[42] This approach is often referred to as the 'market access' approach. This approach was not fully adopted within the GATS framework.[43] The provision dealing with non-discriminatory measures, Article VI GATS, does oblige WTO Members to observe various rules when applying non-discriminatory measures affecting trade in services.[44] As such, Article VI GATS provides procedural rules relating to due process; WTO Members are required to ensure that measures of general application are administered in a reasonable, objective and impartial manner. Moreover, WTO Members are required to ensure independent review for specific administrative decisions affecting trade in services. Paragraph 6 obliges Members to provide adequate procedures to verify the competence of professionals of other Members.[45] The second aspect of Article VI is formed by the mandate provided in paragraph 4 and the provisional application of paragraph 5 in the absence of the, to be negotiated, disciplines concerning domestic regulation.[46] Paragraph 5 provides that specific commitments may not be nullified or impaired through the application of domestic regulatory measures covering licensing, qualifications, or technical standards. The effectiveness of Article VI:5 seems to be greatly reduced due to the addition of the words 'reasonably expected'. Domestic regulation already in place when a commitment is undertaken could be seen as reasonably expected, entailing that this provision would not apply to such regulations. Additionally, this measure may not entail a full standstill provision, as newly introduced measures may be reasonably expected as well.[47] The provision concerning domestic regulation and the ongoing negotiations could lead to a similar approach as adopted by the ECJ regarding non-discriminatory (regulatory) domestic measures dealing with service provision, be it that under GATS law this approach would be limited to qualification requirements and procedures, technical standards and licensing requirements.[48]

4.3.2 Harmonization and mutual recognition

In general, states tend to heavily regulate service provision which leads to hurdles when states start to liberalize their service markets to grant access for service providers of other states. Theories derived from socio-legal studies provide an interesting perspective on globalization and the broadening of international trade obligations. Foreign investment and movement of natural persons increasingly

42 Chapter 3, par 3.5.1.
43 Cottier and Oesch 2012, p 147; Howse provides an instructive overview of the initial WTO discrimination approach and the shift towards targeting non-discriminatory measures obstructing trade, Howse 2012, p 445-447.
44 Note that the market access approach was adopted by the ECJ long before the drafting of the GATS. The drafters of the GATS thus were familiar with the Court's jurisprudence.
45 Chapter 2, par 2.5.1.3.
46 Chapter 2, par 2.5.3.1.
47 Chapter 2, par 2.5.1.3.
48 See the definition provided in chapter 2, par 2.5.3.1.

confronts domestic legal orders with foreign service providers, leading to situations where plural legalities encounter and interact. The perspective of legal pluralism provides a theoretical background in which to place globalization and the increasing conflicts or inter-mingling the opening of borders causes between various domestic legal orders.[49] Clearly, liberalization of trade in services requires national regulatory regimes to ensure compatibility, a process provided by the international trade regimes. As to facilitating compatibility, negative integration has proven insufficient in the EU legal order. As a consequence, mutual recognition and harmonization were required to further reduce remaining barriers to a true level playing field in services.[50] The fact that sovereignty is transferred to the EU institutions leads to a fundamental difference with the WTO when it comes to the method to achieve the goal of liberalizing trade in services, as the EU is more institutionalized.[51] Moreover, the EU has an extensive range of legislative powers, whereas the WTO has very limited legislative autonomy.[52] The non-discrimination approach is facilitated by deregulation, as well as harmonization and mutual recognition.[53] However, at the WTO level, the regulatory intervention is limited to development of disciplines, the extent and result of which are quite modest compared with the numerous examples of secondary legislation under EU law.[54]

4.3.3 Reconciling trade liberalization and national regulatory objectives

Trade liberalization aims at the removal of barriers to trade derived from protectionism, unnecessary, or unnecessarily restrictive, measures. Such measures, in particular non-discriminatory measures, may be hard to distinguish from measures that regulate legitimate national policy objectives. Both Treaties, from the outset, have expressly incorporated a list of policy objectives which are of such importance to national governments that these objectives justify derogations from the obligations relating to trade liberalization.[55] GATT Article XX, addressing the general exceptions to trade liberalization, was the source of inspiration for the Treaty establishing the European Economic Community provision that is now Article 36 TFEU. These grounds therefore reflect the policy objectives deemed important during the 1950s in relation to trade in goods.[56] For services trade, the

49 This theoretic perspective is derived from C Arup *The New World Trade Organization Agreements, Globalizing Law through Services and Intellectual Property* (Cambridge University Press Cambridge 2000), in particular chapter 1.
50 Chapter 3, par 3.2.2 and 3.2.5.
51 M Klamert *Services Liberalization in the EU and the WTO. Concepts, Standards and Regulatory Approaches* (Cambridge University Press Cambridge 2015), p 48-49; Slotboom 2005, p 59-60.
52 Slotboom 2005, p 61.
53 Howse 2012, p 451.
54 Klamert 2015, p 49-50.
55 Gaines and Olsen 2012, p 205-205.
56 Chapter 3, par 3.5.2.

TFEU provides express derogations for measures addressing public policy, public security and public health objectives. Limiting a service providers migration rights (exit, entry and residence) must be based on a present 'genuine and sufficiently serious threat affecting one of the fundamental interests of society' which lies in the personal conduct of the service provider. In any case, a measure must pass the proportionality test in order to rely on a justification ground. Additionally, the free movement of service providers does not apply to official authority positions, but only if the exempted activity relates to state interests.[57]

As can be seen from the development of EU law, the adoption of the market access approach, which targets indistinctly applicable measures obstructing trade, led to a significant broadening of the scope of the fundamental freedoms. As a consequence non-discriminatory measures necessary to regulate certain policy objectives now fall within the scope of the fundamental freedoms. Such measures can be justified on the basis of the ECJ case law concerning justifications in the public interest (also referred to as the rule of reason). As with the express derogations, reconciling trade liberalization obligations with recognized policy objectives is based on the proportionality test. Unnecessary (restrictive) regulations must be removed. The application of such regulations to service providers who already fulfil similar criteria in the home state is not allowed either. The EU proportionality test requires measures to aim at a legitimate objective; the measure must be necessary to fulfil that aim and no less trade distorting measure should be available to reach a similar level of protection towards that aim. Even if the aim of a certain measure is legitimate, necessary and the least restrictive alternative, regulatory measures occasionally are considered an unlawful breach of the internal market provisions. In such scenarios the interest of the national measure is deemed less important than the objective of the internal market. As such, European Courts (or national courts applying EU law) may determine a case on the basis of proportionality *sensu stricto*, be it that this does not occur when measures are taken in a field where the legislator has discretionary powers.[58] Under EU law, this effectively means that any measure liable to hinder trade in services between the Member States is suspect, and must pass the proportionality test to not be deemed contrary to Article 56 TFEU.

Exceptions comparable to those contained in Article XX GATT were incorporated in GATS Article XIV, be it that only five grounds are listed: public morals, public order, human, animal or plant life or health. Article XIV is modelled after Article XX GATT and contains similar language. As trade in services often has an impact on domestically sensitive issues, the GATS exceptions are more elaborate and more broadly formulated than their GATT counterparts. Though the number

57 Chapter 3, par 3.5.2.
58 Chapter 3, par 3.5.2.

of policy grounds is more limited, the public order justification provides a considerate margin for regulatory autonomy.[59] If the number of commitments, and thus the coverage of the GATS is extended in the future, a development towards an open-ended list can reasonably be expected.[60] Within the WTO legal order, the equivalence of measures is assessed by applying the proportionality principle as well.[61] This not only applies to the justification grounds contained in the GATS,[62] it is an inherent feature of the Agreement. The GATS does not have the aim to target regulation as such, it tries to reduce *protectionist* measures or *unnecessary* barriers to trade.[63] If negotiations concerning the Disciplines on Domestic Regulation are successful, some form of a proportionality test will apply to non-discriminatory QTL. Until these Disciplines are adopted, Article VI(5) provides for a provisional, limited version of necessity. However, GATS negotiations in general, and regarding Disciplines on Domestic Regulation in specific, are not progressing. WTO Members are deeply divided regarding the substance of these disciplines. Exactly how intensive scrutiny relating to QTL will become is a matter under heavy debate.[64] It is therefore difficult to provide sound conclusions.[65] Nevertheless, to me it seems apparent that the EU experience demonstrates a fully functioning necessity test to require proper justification grounds.

4.3.4 The regulatory objective and service mobility, social dumping and controlling immigration

As described by Hatzopoulos, regulating service provision rarely concerns the service itself. As services are usually provided in accordance with the needs of the service receiver it becomes difficult to 'define a service "unit" as well as to identify the ingredients of a service'.[66] Consequently, regulation tends to target the service provider directly, imposing conditions, such as qualifications, authorizations, membership of profession organizations, or the circumstances under which services are provided such as opening hours, location or price fixing.[67] Service provision regulation is normally not of a technical nature; rather such measures are of a social or

59 Chapter 2, par 2.5.3.1; see also T Cottier, P Delimatsis and NF Diebold 'Article XIV GATS General Exceptions' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 291-292.

60 Chapter 2, par 2.5.3.1.

61 Schroder 2011, p 164-165, note that Schroder's work is based on trade in goods.

62 Chapter 2, par 2.5.3.

63 Chapter 2, par 2.3.5.2.

64 Chapter 2, par 2.5.1.3.

65 See for instance KE Sørensen 'Non-discriminatory restrictions on trade' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press Cambridge 2012), p 189-190.

66 V Hatzopoulos 'Forms of Mutual Recognition' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press Cambridge 2012), p 62-63.

67 Hatzopoulos 2012b, p 63.

environmental nature.[68] The GATS tries to strike a balance between the right to regulate on the one hand and trade liberalization on the other.[69] Similarly, the EU method of dealing with regulatory differences is a mixture of prohibiting protectionism, imposing mutual recognition and providing harmonization. In general, very little is required for national measures to fall within the scope of the liberalization provisions, and such measures require an objective justification not to be considered contrary to the free movement of service providers.[70] The question of fundamental importance in both legal orders therefore is how to reconcile regulatory autonomy with trade liberalization. In order to answer that question in relation to this research, it is necessary to identify the motivation to regulate mobility of service providers.

Liberalization of service provision which leads to movement of natural persons suffers from heavy resistance in the national legal order of developed states. This reluctance is exacerbated whenever EU law leads to mobility for third-country nationals.[71] The same reluctance can be perceived when it comes to the GATS and the liberalization of Mode 4.[72] The heart of this resistance in the national legal order is likely the sensitivity of this form of trade liberalization. This sensitivity is derived from the proximity of the topic to labour market and immigration policies.[73] However, the GATS specifically indicates that Mode 4 concerns temporary service provision and not the liberalization of labour.[74] As indicated by Persin: 'even though Mode 4 is not a migration category or concept, it is in practice regulated by migration policies including visa requirements'.[75] The question remains where resistance to service mobility comes from, or rather, why labour market and immigration policies are so sensitive. Perhaps of even more importance is the question why (developed) states consider *service* mobility to have an impact on these policies. A strong pointer is provided above in relation to the differences between the method and scope of the WTO and the EU. The closer states are from an economic perspective, the more willing they are to integrate their markets.[76] The benefits of economic integration are theoretically based on the theory of competitive advantage. Reducing trade barriers enhances an optimal allocation of the factors of production leading to economic growth for states involved in economic integra-

68 Hatzopoulos 2012b, p 65-66.
69 Chapter 2, par 2.3.3.
70 Chapter 3, par 3.5.1.
71 Chapter 3, par 3.4.2 and chapter 3, par 3.4.3.
72 Chapter 2, par 2.4.3.
73 See for example: C Barnard *EU Employment Law* (Oxford University Press, Oxford 2012), p 23; see also S Tans 'The Unwanted Service Provider: Implementation of WTO and EU Liberalisation of Service Mobility in the Dutch Legal Order' (2011) 34:2 *Refugee Survey Quarterly*, par 4.2.
74 See in particular: Persin, 2008, p 841, referring to: the Global Commission on International Migration *Migration in an Interconnected World: New Directions for Action* (SRO-Kundig, Geneva 2005), p 19.
75 Persin, 2008, p 841.
76 This chapter, par 4.3. Whether it is viable that cultural and political differences matter to states when choosing to integrate economically is a question that falls outside the scope of this research.

tion. It is up to the welfare systems of states to provide protection to those that lose out as a consequence of competition.[77] In the traditional sense, social policy has a market correcting and a social cohesion function.[78] In the EU legal order, a connected prospect which lies at the heart of the EU integration project is that removal of barriers should lead to a redistribution process between the Member States involved. The economic differences between the Member States should lessen due to the equalization in the price of labour. Consequently, a new market situation would emerge with increased productivity and prosperity for all involved states.[79] However, fifty years later regulatory diversity relating to social protection remains significant, not least as the EU had just expanded to the east. Moreover, there is no international binding floor of rights relating to the issue.[80] This spontaneous process was coupled with a provision concerning social policy. As will be explained below, the process of removing barriers relating to the fundamental freedoms is perceived by some to place the national systems involved into regulatory competition.[81] To address this problem the EU has developed a social policy which initially involved the supranational organs only in the form of non-binding consultations.[82] The post-Lisbon social policy mostly concerns minimum harmonization, leaving the Member States free to maintain or adopt their own regulatory diversity above the threshold set by the EU.[83]

The same economic theories underpin the WTO Agreement and the GATS; reduction of barriers leads to a better allocation on the basis of the theory of competitive advantage. However, the WTO has left the question how to address differences in social policy in relation to liberalizing trade unaddressed, with the exception of the Singapore Declaration which reaffirms the WTO Member States adherence to the core labour rights as developed by the International Labour Organization.[84] As such, the GATS does not contain any provisions on a social policy. The drafters of the GATS did foresee downward pressure on national regulatory autonomy, since impediments to trade in services take the form of measures by the WTO Member States. Therefore, in general, the GATS tries to balance the right to regulate on the one hand and trade liberalization on the other. This includes regulations relating to social policy.[85] As the issue is not centrally addressed, the EU has added the so-called 'blanket reference' to its horizontal Mode 4 commitment, indicating that:

77 O de Schutter 'Transborder Services and Social Dumping' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press Cambridge 2012), p 350.
78 Barnard 2012, p 35.
79 Chapter 3, par 3.2.1. See also: De Schutter 2012, p 349.
80 De Schutter 2012, p 350.
81 Barnard 2012, p 38.
82 Barnard 2012, p 4, who notes that Article 119 EEC concerning equal pay for men and women did contain a limited form of substance, though only in relation to Member States and not to individuals.
83 Barnard 2012, p 43.
84 Chapter 1, par 1.2.3.
85 Chapter 2, par 2.3.3.

> All other requirements of [Union] and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements.[86]

A fundamental problem related to this process is the fact that the regulation ensuring the welfare state may in itself impede trade.[87] Scharpf notes that the original purpose of domestic social policy regulations can be better protected through re-regulation at the European or international level.[88] A connection between trade liberalization and economic and social human rights protection is therefore a much debated subject, centring on the question whether differences related to wages and labour rights form competitive advantages or social dumping. Simultaneously, the issue is directly relevant for national and migrant workers involved as it can be argued that these respectively either suffer unfair labour competition or exploitation. The topic here under discussion, trade in services, is not about labour migration, yet the discussion was rekindled in particular after the EU 2004 enlargement in relation to trade in services. The ECJ ruled that service provision, including through the posting of workers, does not lead to access to the labour market and that the service provider should comply with home state legislation.[89] Nevertheless, it is not difficult to see the proximity between service provision, in particular through posted workers, and the national labour market of the host state. As such, the EU Member States may impose the core of their regulations and collective agreements relating to the labour market to all those employed on their territory, including posted workers.[90]

Social dumping

The main argument when looking from a labour market perspective relates to fears over social dumping.[91] The concept of social dumping can roughly be explained as follows. Generally speaking, developed countries argue that the liberalization of international trade (both in relation to goods and services), in some way,

86 World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, horizontal commitment Mode 4, available online: <www.wto.org>.

87 De Schutter 2012, p 349.

88 FW Scharpf 'Introduction: the Problem Solving Capacity of Multi-level Governance' (1997) 4 *Journal of European Public Policy*, p 526.

89 See also: I Lianos and O Odudu 'Introduction' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press Cambridge 2012), p 1-2.

90 Chapter 3, par 3.4.2.

91 De Schutter 2012, p 349-350. Issues such as ensuring return of service migrants will not be addressed in this research.

has to be connected to labour law. The argument is based on the thought that weak labour law regulation leads to an unfair competitive advantage in relation to countries with a higher level of protection. Low wage countries claim the opposite, a connection between liberalization of trade and labour law flows from protectionism and would negate their legitimate comparative advantage.[92] From a labour mobility perspective, the social dumping argument takes a specific form.[93] Developed countries are struggling with the idea that through liberalization low wage workers become available in countries where before liberalization companies could only use expensive domestic workers. This applies to local companies as well as to companies established abroad operating within a country through the posting of personnel. The idea is that migrants are willing to work for lower wages and under worse circumstances than local employees. Note that attracting personnel from abroad influences the local level of wages even if wage parity is ensured. Normally, a shortage in personnel will lead to an increase in the level of wages. However, the possibility to employ foreign workers will disrupt this process.[94] Possibilities to employing workers from abroad could also lead to job loss for local workers, in particular when patterns relating to circular service mobility appear. A traditional long term labour contract is then fulfilled through consecutive short-term service contracts. From a human rights perspective an opposite fear is expressed, providing foreign workers with a lower wage violates the principle of non-discrimination and could lead to exploitation.[95] Consequently, fear over foreign workers unfairly competing with domestic workers and fears regarding job loss in general have led to the adoption of restrictive migration policies in an attempt to protect domestic labour markets.[96] It is interesting to point to the aims of the Dutch policy relating to the employment of aliens which include *inter alia* a restrictive policy of access for labour migrants and combating illegal labour.[97]

92 JM Servais 'The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?' (1989) 128:4 *International Labour Review*, p 423; BA Langille 'Eight ways to think about international labour standards' (1997) 31 *Journal of World Trade*, p 29-31; GW Florkowski *Managing Global Legal Systems: International Employment Regulation and Competitive Advantage* (Routledge, New York 2006), p 54. Many developing countries under scribe this viewpoint, for instance the Association of South-East Asian Nations (ASEAN) and India, see: JS Mah 'ASEAN, Labour Standards and International Trade' (1998) 14 ASEAN *Economic Bulletin*, p 292.

93 See for instance: H Verschueren 'Sociale Zekerheid en Detachering binnen de Europese Unie. De Zaak Herbosch Kiere: Een Gemiste Kans in de Strijd tegen Grensoverschrijdende Sociale Dumping en Sociale Fraude' (2006) 3 *Belgisch Tijdschrift voor Sociale Zekerheid*, p 404.

94 PL Martin, 'GATS Migration and Labor Standards', International Institute for Labour Studies (2006) 165 ILO Discussion Paper, p 7 and 12, available online: <www.ilo.org>.

95 Trebilcock, Howse and Eliason argue that fear of job loss and pressure on social security is unwarranted, except regarding job loss for the lowest wage jobs, as long as migration is guided orderly, M Trebilcock, R Howse and A Eliason *The Regulation of International Trade* (Routledge London 2013), p 784. Martin is far more critical regarding Mode 4 advantages, Martin 2006. See also: Ö Edström 'The Free Movement of Services in Conflict with the Swedish Industrial Relations Model – or was it the Other Way Around?' in N Wahl and P Cramér (eds) *Swedish Studies in European Law volume 1* (Hart Publishing, Oregon 2006), p 131.

96 C Dommen 'Migrants' Human Rights: Could GATS Help?' (2005) Migration Information Source, available online: <http://www.migrationinformation.org> (last visited 1 October 2015).

97 Dutch Parliament, *Kamerstukken II* 1993/94, 23 574 Nr 3 (Memorie van Toelichting), p 4.

Race to the bottom, regulation argument

The problem described under the denominator 'race to the bottom' stems from social dumping in an attempt by countries to escape the negative effects of it.[98] The race to the bottom theory and the need for international labour law is the subject of a thoroughly constructed article by Langille that can be summarised as follows. The, well known, classical theory is that the need for national labour law comes from the inequality in bargaining power between employers and employees. Labour law tries to reduce the bad results flowing from this inequality through intervention in the freedom of the market. The need for international law can be said to arise from a negative downward spiral in national labour rules caused by a prisoner's dilemma. Labour law leads to higher costs for producers. When producers have the possibility to transfer their economic activity to another country where the regulatory costs are lower, then states can be confronted with the loss of jobs. Thus states could be tempted to reduce the costs undertakings have to bear by lowering their labour law standards, for instance by lowering safety norms or minimum wages. Other states will be tempted to act similarly leading to a downward spiral in regulation. From an economical perspective it is attractive for states to lower the costs caused by labour law, irrespective of what other states will do. In theory this leads to the lowering of labour law standards in all states to preserve or draw investment. International peremptory minimum rules can remedy this spiral and it is here that international labour law finds its reason for existence.[99] An example in the context of services can be found in outsourcing. Companies can transfer a part of their activities to a low wage country, for instance the telephone, or online helpdesk. Gray gives the interesting example of houses being pre-fabricated in Poland that are then transported in parts to the United Kingdom to be assembled.[100]

The discussion concerning trade and labour law received new interest as a consequence of the increasing globalization at the end of the last century and the creation of the WTO in particular.[101] Globalization in economic integration no longer

98 Trebilcock, Howse and Eliason 2013, p 720-721; Scharpf 1997, p 521; Barnard 2012, p 38.

99 BA Langille *What is International Labour Law for?* (International Institute for Labour Studies Geneva 2005), online available: <http://www.crimt.ulaval.ca/Publications/IILS_Report_2005.pdf>, p 10-12; Trebilcock, Howse and Eliason 2013, p 721; Scharpf 1997, p 521.

100 A Gray 'Unsocial Europe; The Future of the European Model in the Face of Globalisation' (2005) London South Bank University Paper, p 13, online available: <http://www.sv.uio.no/arena/english/research/projects/cidel/old/WorkshopStockholm/Gray.pdf> (last visited 1 October 2015). Gray explains that the example concerns a cheap solution for a shortage in trained and experienced construction workers in the UK. The influence on employment for British workers is therefore limited in this example. Note that such practice could affect the wage level in the sector over a longer period, as normally wages would rise, drawing more workers to the sector.

101 Globalization can be defined as 'a process of rapid economic integration among countries driven by the liberalization of trade, investment and capital flows as well as rapid technological change, ILO Governing Body Working Party on the Social Dimensions of the Liberalization of International Trade, Progress report on the country studies on the social impact of globalization, ILO Governing Body Working Party on the Social Dimen- →

mainly concerns trade in goods but also investment, services, intellectual property, the environment and competition law.[102] As Langille explains, new problems emerge as not only goods, but also the factors of production have become mobile.[103] The race to the bottom argument requires nuance. Scharpf explains, in relation to trade in products, that national regulations relating to health, safety or environmental purposes applying to imported products can prevent the downward pressure on regulatory systems. Thus, trade liberalization that allows a domestic regulatory system to impose certain core values leads to a higher regulatory bottom.[104] Moreover, Scharpf points to an opposite mechanism referred to as the 'California effect'. This effect entails that consumers may be inclined to ignore the lower price offered due to a less intensive regulatory system and instead buy products which are more expensive precisely due to a higher level of regulation applying to that product. If the consumers are aware of the benefits regarding the quality of the product due to a higher level of regulation (or a less detrimental effect on the environment, or the avoidance of the exploitation of workers) they are provided with an incentive to buy the product subject to a higher level of regulation.[105] For this effect to emerge, consumers must have information, otherwise the 'better' product may not be rewarded; thus lack of information may constitute market failure.[106] However, information regarding the quality ensured by regulation can provide a competitive advantage for firms subjected to that regulation.[107] If we transpose these concepts to service mobility and the effect liberalization may have on social policy two opposing effects can be discerned. On the one hand, as noted by Scharpf in relation to environmental policy:

sions of the Liberalization of International Trade, Progress report on the country studies on the social impact of globalization, March 1999, Session 274, GB.274/WP/SDL/2, par 14. Another simple definition is provided by Turnell: 'the greatly enhanced international mobility of goods, services and capital, coupled with accommodating advances in information technology', S Turnell 'Core labour standards and the WTO' (2001) 0103 Macquarie Economic Research Paper, p 2 fn 1. Naturally, many other definitions can be found.

102 Langille 1997, p 29.

103 Langille 2005, p 10-12.

104 Scharpf 1997, p 523.

105 A highly interesting example can be found in relation to trade in goods. Since the 2008 Melamine baby milk powder scandal in China, Chinese consumers buy great amounts of European baby milk powder. A news item on the 24th of April 2013 indicates that Chinese investors are going to build and open a baby milk powder factory in Assen (The Netherlands). Thus, quality issues lead to an exactly opposing situation of capital moving to low wage countries such as China, see the article by the Dutch newspaper NRC 'Chinezen bouwen babymelkpoeder fabriek in Assen' 24 April 2013 available online: <http://www.nrc.nl/ nieuws/2013/04/24/chinezen-bouwen-babymelkpoederfabriek-in-assen/> (last visited 1 October 2015).

106 Scharpf 1997, p 522-523; G Akerlof 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 85 *Quarterly Journal of Economics*, p 499-500; Akerlof's publication is highly informing concerning the problem of a lack of information leading to market failure as the consumer has no opportunity to assess quality; see also Barnard 2012, p 38.

107 Scharpf 1997, p 523.

> the pressure to reduce existing levels of protection will be strongest in internationally exposed industries and in areas where regulations adds significantly to the total costs of production.[108]

On the other hand, again in relation to environmental policy, Scharpf notes that:

> International economic competition will least affect highly politicized regulations that have the purpose of preventing or abating conditions or activities that are considered harmful in themselves[109]

The type of pressure international competition provides on social policy depends on the objective sought by that policy.[110] The core labour standards adopted by the ILO and formally reaffirmed by the WTO Member States in the Singapore Declaration[111] relate to a form of social policy that, from a political perspective in most states, is relatively resistant to this downward pressure.[112] The influence of the race to the bottom relating to welfare aspects of social policy is quite different. Scharpf indicates that these social policy regulations are more akin to taxation and 'highly vulnerable to the pressures of international regulatory competition.'[113] Regarding taxation, free movement of capital provides the possibility for companies to operate from a tax friendly state, which in turn provides an incentive to states to lower taxes to prevent firms from moving abroad, or even to attract capital. Naturally, these movements of capital influences the availability of jobs as well. Social policy relating to welfare is similar, states may be inclined to attract investment by reducing the costs for companies related to social welfare and labour standards.[114] Scharpf specifies that states may be less inclined to compete at the regulatory level in relation to labour standards, i.e. the core standards addressed in Directive 96/71/EC, in comparison with social welfare, as the former are:

> impeded by the political commitment of national governments to social-policy purposes and by the resistance of unions and other groups that would suffer from deregulation and cutbacks.[115]

108 Scharpf 1997, p 524.
109 Scharpf 1997, p 525-526.
110 Scharpf 1997, p 525.
111 Chapter 1, par 1.2.3.
112 Scharpf 1997, p 525.
113 Scharpf 1997, p 525.
114 Scharpf 1997, p 525; Langille 1997, p 42-43.
115 Scharpf 1997, p 526.

Interesting, whether the arguments relating to downward pressure on regulatory levels are actually supported by empirical evidence is not all that relevant. In the political debate states (and labour unions) operate on the basis of this premise.[116]

Social dumping from a service provision perspective

When we apply these argument to the topic here under discussion, this pressure will therefore vary between service sectors. Depending on the service, the labour involved in providing the service to a great extent determines the price. This is particularly relevant in relation to services that can be provided by low skilled workers or services that involve intense labour to provide them. In turn, the cost of the labour involved is to a great extent determined by the regulatory level relating to labour standards. To provide an often used example of service provision, the price of hair dressing services is almost completely constituted by the wage level of the provider. The price of taxi driving services may depend on the price of oil, the price of the car and perhaps the price of obtaining a licence. Presuming that such costs are similar (competing taxi drivers will be in geographic proximity and thus likely subject to similar costs),[117] it is again the wage of the taxi driver which determines the competitive advantage. Regarding services which require a high skill level (and therefore education and diploma's), the wages may be at a higher level, yet competition again is mostly determined by the price requested. Depending on the availability of service providers (or their personnel) price competition is less fierce. Nevertheless, in a globalized world, barring regulatory intervention, the labour involved in providing the service to a great extent determines the price. Consequently, to a great extent the regulatory level relating to labour standards determines the price of the service. This is simply the consequence of a service constituting a contract between provider and receiver. As with the above described discussion relating to products, the quality of the service provided forms an important aspect of competition. For this aspect to provide a relevant incentive for consumers, information regarding this quality is crucial. As to the second argument provided by Scharpf, politically sensitive policies are less inclined to succumb to regulatory downward pressure due to international competition. Interestingly, labour market and immigration policies are about as sensitive as policy areas get. This is exactly why discussion concerning international trade liberalization and regulatory autonomy is so fierce.

116 Langille 1997, p 43; Barnard 2012, p 39.
117 This presumption alters in cases close to national borders.

Fears over mass migration within the EU

A related subject is the question whether a high level of social welfare is perceived by (developed) states to draw migrants.[118] Such claims are subject to criticism. Groenendijk demonstrates (in 2009) that since 1968 (the end of the transitional period relating to the internal market) each accession of new Member States caused old Member States to express fears over the free movement of workers leading to uncontrollable migration by nationals from the new Member States.[119] These fears were expressed even in relation to the UK over black Britons migrating to The Netherlands and Germany.[120] Groenendijk indicates that these claims are mostly unfounded. Opening borders actually resulted in return migration from the Northern Member States in relation to nationals of Greece, Portugal and Spain.[121] However, whether these claims are backed by empirical evidence seems irrelevant in the political debate. Yet, according to the ECJ, as is clear from case law concerning the posting, and even hiring-out of workers, service mobility, whatever its form, does not lead to access to the labour market of a host state. Legitimate control by the host Member State is allowed, but should not render illusory the right to provide services. It is here that the ECJ emphasizes the aim of a level playing field in services, which requires full service mobility.[122] The argument made by the ECJ can be explained by providing a practical example. Service provision concerns a contract between a provider and a receiver, comparable to manufacturing and buying a certain product. Presume that someone in the Netherlands wants to have a house built. In principle that person will offer a service contract to a service provider who will then arrange that the materials arrive at the building site and that a team of workers constructs the house. The house will be built at a certain price, presumably the best price in relation to a certain quality. Depending on the international legal regime, the host state may impose core labour standards (EU)[123] or whatever standards inscribed in the Mode 4 commitments (GATS) on the employer of the workers building the house (the service provider, possibly through subcontracting). The imposed labour standards may not fall below the material content of the economic human rights which bind the host state in question.

Whether these fears over Mode 4 trade liberalization are justified depends on the conditions that apply to the commitments. Countries can liberalize under the

118 C Barnard *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press, Oxford 2010), p 225; N Foster Foster on EU Law (Oxford University Press, Oxford 2013), p 277-278.

119 K Groenendijk 'Forty Years of Free Movement of Workers: Has It Been a Success and Why' in P Minderhoud and N Trimikliniotis (eds) *Rethinking the Free Movement of Workers: the European Challenges Ahead* (Wolf Legal Publishers, Nijmegen 2009), p 13.

120 Groenendijk 2009, p 13, referring to WR Böhning *The Migration of Workers in the United Kingdom and the European Community* (Oxford University Press, Oxford 1972), p 133ff and 155ff.

121 Groenendijk 2009, p 13; see also Guild 2001, p 93.

122 Chapter 3, par 3.4.2.

123 Chapter 3, par 3.5.3.1.

condition that service providers from abroad have to be paid a minimum wage or at wage parity. The application of national labour standards regulation can be ensured as well. Most WTO Members that have adopted Mode 4 concessions, including the EU, have ensured wage parity and equal working conditions for GATS migrants.[124] The EU has firmly protected itself by indicating that '[a]ll other requirements of [Union] and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements'.[125] All in all, it is quite clear where resistance to service mobility (in relation to third-country nationals, and transition citizens) and GATS Mode 4 comes from. In general, and particularly regarding Mode 4, adopting a more liberal national access scheme is different from binding that scheme in a commitment. When economic conditions change a state has the option to reinstate restrictions. This option is no longer available after binding the current measures or policy by inscribing them in the schedules of commitments.[126]

4.4 The scope of WTO and EU freedom to provide services

Though the GATS is constructed in a different manner, progressive liberalization through commitment per service sector and per mode of supply, the potential scope of the service sectors addressed by the GATS is mostly similar to that of the EU freedom to provide services. Barring a few carve-outs relating to governmental services, and some specific services such as air traffic rights, the coverage of service sectors under both legal orders is almost all-encompassing. A fundamental difference between both trade orders is the fact that the EU internal market also covers the free movement of workers, whereas the WTO is limited to goods and services. The GATS specifically excludes labour from its scope. Within the EU legal order, enlargement with new Member States leads to a transitional period, at least for most Member States, during which the labour markets of the old Member States may adapt to labour migration from the new Member States.[127] Thus, for a specific period of time, the new EU nationals are faced with a restriction relating to the free movement of workers, but not to the freedom to provide services. This sit-

124 Dommen 2005, par 'on wage and working conditions'.
125 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal section Mode 4.
126 UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (Earthscan, New York 2005), p 87. While it is possible to withdraw commitments, the GATS rules prescribe that a compensating commitment needs to be negotiated, GATS Article XXI. Persin provides an interesting study based on the United Kingdom's reluctance to increase its Mode 4 commitments, while it did allow movement of labour from the new EU Member States before this was obligatory. Her main conclusion relates to the argument that Mode 4 commitments are binding, thus lacking flexibility required in labour market policies, Persin 2008.
127 Chapter 3, par 3.4.3.

uation has led to significant difficulties and discussions within the EU which may be summarized as follows. Old Member States are trying to restrict so-called bogus service provision, indicating that the new EU nationals are pretending to be self-employed and working on the basis of a service contract, while they are in practice workers of the receiver of the service contract, or an intermediary company. On the other hand, genuine service providers from the new Member States may face protectionist measures from the old Member States who consider them to be bogus service providers. Finally, employers may abuse this 'in-between' situation of new EU Member State nationals, formally hiring service providers while they in reality exploit cheap labour.[128]

4.5 Facilitation of implementation through European law

The question of implementing WTO law obligations is not just a question of national law as many legislative powers have been transferred to the European Union. The nexus between WTO law and the national legal order of the EU Member States is formed by a triangle. The individual or undertaking, the actual bearer of rights conferred by WTO law, surfaces both on the national level and the EU level as some obligations are implemented domestically, while others are implemented through EU law. Implementing, applying and enforcing WTO law is the priority of WTO Member States. Individuals that perceive their rights to be hampered by a specific Member can persuade their government to commence proceedings through the Dispute Settlement Mechanism.[129] This paragraph will investigate how a WTO Member can or must facilitate this implementation process by allowing its domestic courts to aid service providers from other WTO Members to effectuate their WTO rights. Several means are available: direct effect, consistent interpretation and liability for breaches.

4.5.1 Direct effect of WTO law

ECJ case law indicates that provisions of international treaties concluded by the European Union can have direct effect, thus allowing them to be relied upon by individuals before their national courts. In the *Kupferberg* judgment the ECJ determined that it had primary competence regarding the interpretation of international agreements.[130] Where provisions of such agreements involve unconditional

128 These matters will be addressed in chapter 5, par 5.4.4 and chapter 6, par 6.4.4.

129 Chapter 2, par 2.6.

130 Case 104/81 *Hauptzollamt Mainz v Kupferberg* ECLI:EU:C:1982:362, par 14. See for a discussion suggesting that *Kupferberg* is now outdated: PJ Kuijper and M Bronckers 'WTO Law in the European Court of Justice' (2005) 42 *Common Market Law Review*, p 1317-1322.

and precise obligations they can be directly relied upon as their application does not require any prior intervention.[131] Moreover, international treaty interpretation rules requiring the examination of text, context, object and purpose are to be applied when determining whether a provision has direct effect.[132] The ECJ based its decision on two main arguments. Direct effect signals to trading partners that the EU upholds its obligations. As an international agreement is an act of EU institutions and forms an integral part of EU law, its uniform interpretation must be ensured by the Court.[133] Whether provisions of a Treaty indeed have direct effect under EU law is decided on a case-by-case basis.[134]

Regarding GATT and WTO law, the ECJ has consistently rejected the possibility to rely directly on its provisions and obligations in order to challenge the validity of EU measures or national measures falling within the scope of EU law.[135] The Court has held that the structure of an agreement can prevent it from having direct effect in its entirety, as was the case with the GATT.[136] Examination of the direct effect of provisions contained in an agreement concluded by the EU with non-member countries invariably involves an analysis of the spirit, general scheme and terms of that agreement.[137] The WTO Dispute Settlement System aims at the removal of measures in violation of WTO law. However the system also provides possibilities for disputing parties to negotiate a short-term solution for the conflict. If the ECJ were then to declare EU measures to be null and void due to a violation

131 *Kupferberg*, par 20-21. Neuwahl indicates that no criteria are provided yet assumes that the classic criteria apply, unequivocal and unconditional not depending on further action. NAEM Neuwahl 'Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law' in N Emiliou and D O'Keeffe (eds) *The European Union and World Trade Law after the GATT Uruguay Round* (John Wiley and Sons, Chichester 1996), p 318. I agree with Kuijper and Bronckers who indicate that the *Kupferberg* case does provide the criteria, provisions need to be direct, precise and no further implementation should be required, thus invocation before, and application by a court should be possible, Kuijper and Bronckers 2005, p 1318 referring to *Kupferberg*, par 26-27. Paragraph 20 can be added as evidence of the introduced criteria: 'involving an unconditional and precise obligation and therefore not requiring any prior intervention'.

132 Kuijper and Bronckers 2005, p 1318, referring to *Kupferberg*, par 23. Customary rules of Treaty interpretation have, to an important extent, been codified in Articles 31-33 of the Vienna Convention on the Law of Treaties (VCLT) and are applied as the standard of interpretation for WTO law, Article II:2 WTO, Article 1 and 3:2 DSU and Annex 1; Vienna Convention on the Law of Treaties, concluded at Vienna 23 May 1969, entered into force on 27 January 1980, 8 International Legal Materials 679 (1969) or United Nations, Treaty Series vol. 1155, p 331. On WTO law interpretation see: J Pauwelyn 'The Role of Public International Law in the WTO: How Far can we Go?' (2001) 95 *American Journal of International Law*, p 542; M Lennard 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 *Journal of International Economic Law*, p 17-18. See further: chapter 2, par 2.3.6.1

133 *Kupferberg*, par 13 and 14, see also: case 181/73 *R. & V. Haegeman v Belgian State* ECLI:EU:C:1974:41.

134 *Kupferberg*, par 18, see also Neuwahl 1996, p 318.

135 *Kupferberg* and case C-149/96 *Portugal v Council* ECLI:EU:C:1999:574. See also case 9/73 *Schlüter v Hauptzollamt Lörrach* ECLI:EU:C:1973:110; joined cases 21-24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* ECLI:EU:C:1972:115; case 266/81 *Società Italiana per l'Oleodotto Transalpino (SIOT) v Ministero delle Finanze* ECLI:EU:C:1983:77; joined cases 267-269/81 *Amministrazione delle Finanze dello Stato v Società Petrolifera Italiana SpA (SPI) and SpA Michelin Italiana (SAMI)* ECLI:EU:C:1983:78; joined cases 290-291/81 *Compagnia Singer v Amministrazione delle Finanze dello Stato* ECLI:EU:C:1983:79.

136 *SPI* and *SAMI*, par 23.

137 Case C-469/93 *Amministrazione delle Finanze dello Stato v Chiquita Italia SpA*. ECLI:EU:C:1995:435, par 25; case C-160/09 *Ioannis Katsivardas – Niukolaos Tsitsikas OE v Ipourgos Ikonomikon* ECLI:EU:C:2010:293, par 33.

of WTO law, the possibility to negotiate an alternative solution would be lost.[138] Moreover, the ECJ rejected direct effect on the basis of reciprocity, as the main trading partners of the EU do not recognize direct effect of WTO rules in their internal legal system.[139] Furthermore, the Court pointed to the preamble of the Council decision approving the WTO agreements which declared that these agreements are not of such a nature that they can be relied on directly before national or Union courts.[140] This last argument is in line with *Kupferberg* where the ECJ stated that the competence to determine whether an agreement has direct effect only resides with the Court in so far as the agreement itself does not settle the matter.[141] It is therefore important to note that the revised EU Doha Round offer indicates that: '[t]he rights and obligations arising from the GATS, including the schedule of commitments, shall have no self-executing effect and thus confer no rights directly to individual natural persons or juridical persons'.[142] Mengozzi points out that, although not explicitly indicated by the ECJ, the scope of the WTO agreements is so pervasive that granting direct effect by the European courts would endanger autonomy of the EU and assign the final role of arbiter to the WTO.[143]

Consequently, WTO law does not have direct effect under EU law. While the recognition of direct effect arguably would enhance effectiveness of WTO rules, not least by raising knowledge of WTO rules among citizens,[144] there are several strong arguments supporting this rejection. Besides the arguments indicated by the ECJ, based on the WTO Dispute Settlement System and reciprocity,[145] direct effect of WTO law would upset the balance of powers in the European Union as the Court would be able to set aside Union law (or national law falling within the scope of Union law) based on the WTO Agreements which are almost as wide in scope as the EU treaty itself.[146] Under EU law direct effect is coupled with suprem-

138 Kuijper and Bronckers 2005, p 1321; C-377/02 *Lèon Van Parys v Belgische Interventie- en Restitutie Bureau* ECLI:EU:C:2005:121, par 51; joined cases C-120/06P and C-121/06P *FIAMM and Fedon v Council and Commission* ECLI:EU:C:2008:476, par 117. See also M Bronckers 'From "Direct Effect" to "Muted Dialogue", Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2008) 11:4 *Journal of International Economic Law*, p 886.

139 *Kupferberg*, par 18; Neuwahl 1996, p 319; Kuijper and Bronckers 2005, p 1322; Bronckers 2008, p 886.

140 Council Decision 800/94 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) OJ (1994) L336/1, last paragraph preamble.

141 *Kupferberg*, par 17; recently: *Ioannis Katsivardas – Niukolaos Tsitsikas OE v Ipourgos Ikonomikon*, par 32.

142 WTO Council for Trade in Services, Communication from the European Communities and its Member States Conditional Revised Offer, 29 June 2005, TN/S/O/EEC/Rev.1, introductory note par 3.

143 P Mengozzi *Private International Law and the WTO Law* (Recueil des Cours vol 929) (Martinus Nijhoff Publishers, The Hague 2001), p 316-317.

144 Neuwahl 1996, p 323, also pointing to the effective possibility of individuals ignoring Union law as they know that due to direct effect of WTO law their position will prevail. Similar: JH Jackson *Status of Treaties in Domestic Legal Systems* (1992) 86 *American Journal of International Law*, p 320-321.

145 Similar: Jackson 1992, p 326; Neuwahl 1996, p 323.

146 See in general regarding disturbance of the balance of constitutional powers EA Alkema *Over implementatie van internationaal recht – de internationale rechtsorde is de onze nog niet* Inaugural address University of Leiden, p 5-7, available online: <https://openaccess.leidenuniv.nl/handle/1887/3764> (last visited 1 October 2015); see also: Jackson 1992, p 323-324.

acy, as international treaty obligations enjoy supremacy over secondary Union law. As rightly emphasized by Jackson, the combination of direct effect and supremacy seriously encroaches upon the possibilities of the legislative power to correct interpretations by the judiciary. Under EU law, these possibilities would be limited to a change of either the EU Treaty or modifying the international agreement.[147] In conclusion, WTO law does not have direct effect under EU law; a change in ECJ case law is unlikely and would be unwise.[148] However, when WTO rules are implemented into EU law, or where EU law specifically refers to provisions of WTO law, the WTO rules have become part of EU law. Consequently, such rules can have direct effect in accordance with the normal EU conditions relating to direct effect.[149]

4.5.2 Indirect effect of WTO law

Direct effect is by no means the only manner in which courts are able to apply international norms in cases before them. The principle of consistent interpretation under EU law provides that domestic courts are obliged to interpret national law as far as possible in the light of EU law.[150] The European Courts have extended the principle to cases where international agreements are involved,[151] including the WTO Agreements.[152] On the basis of treaty consistent interpretation, the judiciary can solve conflicts between legal orders in favour of the international agreement signed by the EU. However, the principle is limited by its own nature. Judges cannot move beyond interpretation, as the basis for the judgment is not the WTO norm, but rather an interpretation of the EU norm, or the national norm, which is

147 Jackson 1992, p 330-331; Bronckers 2008, p 896. Kuijper and Bronckers emphasize that, as direct effect and supremacy are concepts mainly introduced through case law, they can also be altered by latter case law. Nevertheless, the fact remains that for the legislator this would require a change of the EU treaty or a change of the international agreement, neither of which is easy to achieve, Kuijper and Bronckers 2005, p 1320.

148 As indicated by Bronckers, the *Intertanko* case seems to broaden the case law denying direct effect due to the nature and broad logic of international agreements, in this case the United Nations Convention on the Law of the Sea (UNCLOS), Bronckers 2008, p 895; case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* ECLI:EU:C:2008:312.

149 See case 70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities* ECLI:EU:C:1989:254; case C-69/89 *Nakajima All Precision Co. Ltd v Council of the European Communities* ECLI:EU:C:1991:168; *Portugal v Council* (C-149/96), par 27.

150 Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153, par 26; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion* ECLI:EU:C:1990:395, par 7.

151 Case C-286/90 *Anklagemyndigheden v Peter Michael Poulsen and Diva Navigation Corp* ECLI:EU:C:1992:453, par 9, in which the principle was first applied to interpret an EU regulation on fisheries conservation so that it was consistent with the UNCLOS, see Bronckers 2008, p 888.

152 C-53/96 *Hermès International v FHT Marketing Choice BV* ECLI:EU:C:1998:292, par 28 in which national rules with a view to ordering provisional measures for the protection of rights arising under an EU trade mark had to be applied as far as possible in the light of the wording and purpose of Article 50 of the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); joined cases C-447 and C-448/05 *Thomson Multimedia Sales Europe and Vestel France v Administration des Douanes et Droits Indirects* ECLI:EU:C:2007:151. The European General Court refused to interpret primary EU law (Article 102 TFEU) provisions in light of WTO law, thus limiting consistent interpretation to secondary EU legislation, see: Bronckers 2008, p 888 fn 11, referring to case T-201/04 Microsoft Corp. v Commission ECLI:EU:T:2004:289, par 798.

based on the WTO norm. As such, the implementation of the WTO norm through consistent interpretation is dependent on the flexibility of the EU or national norm. Effectively, this means that the principle should not be applied *contra legem*.[153]

4.5.3 State liability for breaches of WTO law

A third means of implementation of WTO law would be to award damages to those that are negatively affected by a breach of WTO law by the EU, or national authorities when acting within the scope of EU law. However, awarding damages does not end the violation itself and does not restore trade opportunities. WTO law does not avail itself of the concept of reparation; the aim is to restore the lost trading opportunities through compensation and retaliation.[154] Nevertheless, damages will at least offer compensation of actual losses and the effect of awarding damages will allegedly lead to better observance of WTO law. The EU itself may be liable for damages caused by its institutions or its servants in the performance of their duties on a non-contractual basis.[155] However, breaches of WTO law by the EU can only constitute a ground for damages under a few limited exceptions.[156] Consistent ECJ case law determines that non-contractual liability of the EU, as ensured by Article 340 TFEU, is established on the basis of three cumulatively applying conditions:

- Actual damage must have been suffered;
- The institutions' conduct must be unlawful (a manifest and grave disregard of the EU institutions limits on its powers);
- There must be a causal link between the conduct and the damage pleaded.[157]

Additionally, the ECJ, inspired by Article 340 TFEU, has developed the doctrine of state liability for breaches of EU law. The Court has formulated the criteria for such liability in line with the Union's own non-contractual liability.

- There must be unlawful conduct on the part of a EU institution
  (a) the unlawful conduct must involve a sufficiently serious breach of a rule of Union law and

153 Similar: Neuwahl 1996, p 323.
154 Note that restoring trade opportunities is the aim of WTO dispute settlement, see Article 22.1 DSU and XVI:4 WTO.
155 Article 340 TFEU, contractual liability is governed by the law applicable to the contract in question.
156 Craig and de Búrca 2015, p 586.
157 Case T-383/00 *Beamglow Ltd v EP, Council and Commission* ECLI:EU:T:2005:453, par 95; case 26/81 *Oleifici Mediterranei v EEC* ECLI:EU:C:1982:318, par 16; case T-175/94 *International Procurement Services v Commission* ECLI:EU:T:1996:102, par 44; case T-336/94 *Efisol SA v Commission* ECLI:EU:T:1996:148, par 30; case T-267/94 *Oleifici Italiani v Commission* ECLI:EU:T:1997:113, par 20.

(b) the purpose of this rule of EU law must be to confer rights on individuals
- There must be a direct causal link between the breach of the obligation and the damage sustained by the injured parties.[158]

In order for a breach by an EU institution or a EU Member State to be considered sufficiently serious, a manifest and grave disregard of the limits of its discretion is required, given that this discretion is present in the first place.[159] As noted by Kuijper and Bronckers this will be easier to establish once the WTO Dispute Settlement Body has deemed that a WTO obligation was breached. However, as was summarized in *Van Parys* it is far from clear when unlawful conduct is established beyond doubt under the WTO DSS.[160] Moreover, as the WTO Agreements aim at opportunities from trade liberalization,[161] it is hard to establish damage, let alone a causal link between the breach of the obligation and the damage.[162] In the *FIAMM* case, the Court rejected liability based on the argument that exporting to non-Member States entails the risk of altered commercial positions, in particular those caused by retaliation possibilities included in the WTO system.[163] It will be difficult to satisfy the conditions to establish liability based on breach of WTO law by the Union or the Member States acting within the scope of Union law.

The *FIAMM* case concerned several EU exporters that had suffered considerable damage due to United States restrictions on imports in retaliation to the EU's infamous banana regime. In *EC – Bananas III* the WTO Appellate Body held that the EU banana regime violated WTO law. The EU decided not to comply with the judgment to protect the position of African Caribbean and Pacific (ACP) banana exporting countries.[164] As is apparent from the second condition, the Union cannot be held accountable for damages caused by lawful action. The Court has specified conditions under which liability for lawful action could be established, however, as explicitly stated in the *FIAMM* case:

> [N]o liability regime exists under which the [Union] can incur liability for conduct falling within the sphere of its legislative competence in a situation

158 Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* ECLI:EU:C:1996:79; these conditions were summarized in: case C-352/98P *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* ECLI:EU:C:2000:361, par 41-43; see also: case C-47/07P *Masdar (UK) Ltd v Commission* ECLI:EU:C:2008:726, par 49; case C-497/06P *CAS Succhi di Frutta SpA v Commission* ECLI:EU:C:2009:273, par 39; case C-419/08P *Trubowest Handel and Makarov v Council and Commission* ECLI:EU:C:2010:147, par 40.

159 *Brasserie du Pêcheur*, par 55.

160 *Van Parys*, par 41-48; Kuijper and Bronckers 2005, p 1332.

161 *United States - Taxes on Automobiles (US – Taxes on Automobiles)* DS 31/R, 11 October 1994, par 3.27.

162 Kuijper and Bronckers 2005, p 1332.

163 Article 22 DSU; *FIAMM and Fedon*, par 186; case 59/83 *Biovilac v EEC* ECLI:EU:C:1984:380, par 28.

164 *EC – Bananas III* Appellate Body Report.

> where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the [Union] courts.[165]

As said, the Court rejects state liability as exporting to non-member states entails risks of altered commercial positions, in particular those caused by retaliation possibilities included in the WTO system. This argument is an example of the condition for liability based on unlawful conduct which requires the damage to exceed the limits of economic risks inherent in operating in the sector concerned.[166] However, Kuijper and Bronckers rightly point out that expecting retaliatory actions from WTO Members is one thing, but expecting one's own government (here the EU) to disregard international legal obligations under the WTO, thereby provoking retaliatory trade restrictions, is something else.[167] If the Union decides to ignore its international obligations, this goes beyond expected acts and imposes a disproportionate burden on specific individuals for the Union's common cause, in particular as the exporters in the *FIAMM* case that suffered damages had no connection with the Union's import regime for bananas.[168] As indicated by AG Maduro, because the victims of retaliation cannot plead the unlawfulness of conduct of EU institutions contrary to WTO law, a solution would be to introduce the concept of liability for lawful conduct.[169] The notion that lawful action in the public interest causing disproportionate damages for an individual or a group can lead to liability, is particularly fitting in scenarios where WTO retaliation is concerned.[170] The lawful conduct of EU institutions causes damages specifically to individuals or a group targeted by retaliation, usually without any connection to the originally violated WTO obligation. This situation seems exemplary of disproportionate damages derived from serving a common Union cause and in my opinion would fit the requirement of damage of an unusual and special nature.[171] Nevertheless, the ECJ did not adopt the argument specifically raised by the AG. Coupled with the consistent repetition of the condition of unlawful conduct, such claims are currently barred.[172]

---

165 Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH* ECLI:EU:C:1997:413, par 18; joined cases C-120/06P; FIAMM and Fedon, par 169 and 175-176.

166 *Biovilac*, par 28.

167 Kuijper 2008, p 892-893.

168 Kuijper 2008, p 893; joined cases C-120/06P and C-121/06P *FIAMM and Fedon v Council and Commission Opinion AG Maduro* ECLI:EU:C:2008:98, par 57-63.

169 *FIAMM and Fedon* Opinion AG Maduro, par 57-60.

170 *Biovilac*, par 27 (indicating that this form of liability is known under German law as 'sonderopfer' and under French law as 'l'égalité devant les charges publiques'); Kuijper 2008, p 892.

171 The (still hypothetical) conditions for non-contractual liability for a lawful act are listed in *FIAMM and Fedon*, par 169.

172 *Masdar*, par 49; *Succhi di Frutta*, par 39; *Trubowest*, par 40. As is apparent from Fiamm and Fedon, the rejection is based on the lack of recognition of the principle in the general principles common to the laws of the Member States, see par 170 and 175, see also Article 340 TFEU.

4.6 Conclusions

This chapter has compared the aim and method of the WTO and the EU in general, and in specific in relation to service trade liberalization. The aim of both international orders is difficult to compare, as EU law includes many policies not included in WTO law. Nevertheless, when focusing on service trade liberalization only, it is possible to indicate a similar function, the creation of a level playing field for service provision. This is an important conclusion, as it is apparent under EU law that a level playing field requires the removal of all but light verifications of the legality of service mobility. Clearly, WTO law is far from the level of integration currently achieved within the EU internal market for services. However, it is important to point out what the ultimate aim of the GATS is. If Mode 4 is to be taken seriously, those sectors that are fully liberalized through GATS commitments should provide a level playing field, which entails the abolition of all barriers, with the exception of specifically allowed barriers under the GATS such as visa requirements. Naturally, full liberalization under GATS requires the realization of Disciplines on Domestic Regulation, as the GATS framework is currently not finished. Clearly, the institutional and legislative framework of the WTO and the EU are not similar. This will have an impact on the extent to which the playing field will actually be truly level. EU law and secondary legislation in relation to services will lead to a far more intrusive set of rules than is currently likely under the GATS.

This chapter has also raised the question why states are hesitant to liberalize service trade when it leads to mobility. Binding international rules in relation to immigration and labour market policies are difficult to accept. Fears over mass or uncontrolled immigration, social dumping and a regulatory downward spiral seem inextricably linked to service liberalization. However, here I must emphasize a clear legal view, given that these binding international rules are derived from a clear transfer of sovereignty in the case of the EU, and a clear reciprocal set of commitments under WTO law, Member States of both legal orders must either accept these consequences, or strive to change the international rules, within the relevant international framework.

Finally, this chapter has provided an overview of the interaction between WTO obligations, EU law and the domestic legal order of Member States. As is apparent from the description of the three main principles facilitating implementation from within a legal order, Union law is far more limited regarding implementation of WTO law within the Union's legal order when compared to the implementation of EU law within the national legal order of its Member States. The rules and concepts facilitating implementation only come into play if the EU legislator specifi-

cally intended to transpose WTO law into Union law. Thus, while EU law was once proclaimed to be a monistic legal order,[173] both the European legislator and the ECJ have 'introduced a modicum of dualism with respect to the WTO'.[174] From the perspective of reciprocity and the risk of upsetting the constitutional balance within the Union, as well as the risk of WTO law encroaching upon virtually all parts of EU law, this is quite understandable. Nevertheless, consistent interpretation of WTO law is accepted and applied.[175] Consequently, to a certain extent implementation of WTO obligations is facilitated by EU law, which has a strong implementation and enforcement mechanism. Nevertheless, the most powerful aspects of that mechanism do not apply to WTO obligations.

173 Article 216(2) TFEU; *Haegeman v Belgium*.

174 Kuijper and Bronckers 2005, p 1315. This dualist approach towards WTO law not only applies to individuals and undertakings but even to Member States in actions for annulment against EU institutions: case C-280/93, *Germany v Council* ECLI:EU:C:1994:367; *Portugal v Council* (C-149/96), par 47.

175 As noted by Bronckers, the ECJ has thus moved ahead of other jurisdictions, in particular the US, Bronckers 2008, p 888.

Chapter 5

Implementation of service trade liberalization in Dutch law and policy

5.1 Introduction

This chapter provides an overview of Dutch immigration law and policy applying to service providers wishing to enter the territory of, and provide services in the Netherlands. First, the regime applicable to non-European Economic Area nationals will be explained. Next, the rules for entry of EEA nationals and the specific transitory regime applying to Croatian nationals will be addressed, as well as the rules applying to posted workers of European Union service suppliers. Finally, the position of Turkish nationals will be described. The Dutch system relating asylum will not be examined.[1]

1 The Dutch Aliens Act divides residence permits into those applying to regular migration, and those applying to asylum related grounds of residence. Regular migration is simply defined as all entry grounds not relating to asylum, Article 1 AA under j. The separation between regular migration and asylum is very strict in Dutch law, which entails that asylum related facts are left out of the decision concerning a regular residence permit, see in more detail: A Kuijer, E Elderman, M Korevaar, T de Lange, H Masmeyer, M Rootring, M Viering and A Woltjer *Nederlands Vreemdelingenrecht* (Boom Juridische uitgevers, The Hague 2005), p 94-95.

It would be convenient to provide an overview of the implementation of obligations derived from the World Trade Organization and EU legal order relating to rights for natural persons to provide their services in the Netherlands. To a certain extend this exercise is possible, for example, the obligations derived from the Dutch General Agreement on Trade in Services commitments relating to Mode 4 are implemented in the Aliens Decree (AD) in a few paragraphs, partly in the form of an exact textual copy.[2] Considering how complicated the GATS legal order is, the Dutch implementation method of simply adopting the text of the commitments is hardly facilitating potential service suppliers. This holds all the more true as the implementation only relates to the conditions under which someone wishing to receive services from a GATS Mode 4 service provider can obtain an obligatory work permit. Various rules relating to entry and residence apply as well, as these are part of the general migration rules. This requires a review of these general national legal rules. These rules can be found scattered throughout layers of legislation that form the entry, residence and work permit regime of the Netherlands. Finally, specific obligations that were not implemented may still be unproblematic due to a national preference that covers the same topic. As an example, the Dutch highly-skilled migration entry scheme can be used by various GATS Mode 4 service providers, notwithstanding that this entry scheme was not adopted to implement GATS Mode 4.[3] The resulting picture is opaque, whereas the GATS framework clearly indicates that transparency is of vital importance. Nevertheless, there are no direct GATS obligations which require (implementing) legislation to be transparent, though application procedures need to fulfil the requirements of Article VI GATS.[4] In contrast, the Dutch rules relating to EU service providers are relatively straightforward. The Citizens Rights Directive is implemented without complications. Nevertheless, EU obligations relating to transition citizens and posted workers lead to problems as well.

The main legislative acts establishing the Dutch immigration rules and the right for foreigners to pursue an economic activity are the *Vreemdelingenwet 2000* which translates to Aliens Act 2000 (AA) and the *Wet arbeid vreemdelingen* which translates to Aliens Employment Act (AEA).[5] EEA nationals, as well as Swiss citizens, face a fundamentally different immigration regime than non-EEA nationals. Both categorizations need to be further diversified. Within the EEA nationals category a distinction is made between EEA nationals enjoying full EU free movement

2 The term alien is used within the context of national migration law. No difference is intended between the use of the term foreigner and alien.

3 This cross-over is recognized in the Effectuating Rules Regulation Effectuating Aliens Employment Act, par 50.

4 The preamble to the GATS indicates that transparency and progressive liberalization are the means towards the creation of a multilateral framework of principles and rules for trade in services, chapter 2, par 2.5.1 and chapter 2, par 2.5.1.3.

5 See the official translations to English, Dutch Ministry of Justice *Begrippenlijst Vreemdelingenbeleid* (Ministerie van Justitie, Directie Voorlichting The Hague 2001), p 46-63.

and nationals of EU Member States still facing restrictions in relation to the free movement of workers (in this research referred to as transition citizens). Non-EEA nationals face several different regimes due to a variety of treaties which contain liberalization obligations relating to service providers. The Swiss, though not part of the EEA, enjoy similar rights as EEA nationals based on the Agreement on the free movement of persons between the EU and Switzerland of 2002.[6] Several nationals of countries with which the EU has association agreements are granted more rights than the general category of third-country nationals.[7] Of these groups, the Association Agreement with Turkey serves as an example, and the implementation of the obligations derived from it into Dutch law will be described in this chapter. Finally, the Netherlands has implemented obligations derived from the GATS. This leads to another diversification between third-country nationals relying on GATS Mode 4, and third-country nationals relying on the general Dutch immigration rules. The legal regime applying to third-country national service providers is therefore based on a work permit. An analysis will demonstrate that some of the national provisions are clearly in contradiction with the GATS obligations; however, this clarity is the exception. Most problems identified below do not expressly run counter to GATS obligations, but they do infringe the method and the underlying rationale of the GATS. Most issues regarding the implementation of service liberalization obligations are closely connected to the fact that the dividing line between service provision and labour is not easily drawn. This holds true for the EU legal order, as well as the WTO legal order. Within the context of the WTO this issue is recognized and receives attention in the form of an administrative hurdle due to treatment of temporary movement within permanent labour flows.[8] Indeed, as will be discussed in this chapter, the manner in which Dutch legislation deals with this division is at the root of the implementation problems as service providers fall within the general legal regime applying to alien workers. A fundamental problem with the application of that regime, which will therefore be described extensively in this chapter, is the fact that all these conditions practically consititute requirements applying to GATS Mode 4 movements. The GATS Annex MNP provides that WTO Members may continue to impose measures regulating 'the entry of natural persons into, or their temporary stay in, its territory, including

6 Chapter 3, par 3.4.1.

7 The term association agreement can be confusing. As this chapter concerns the Association Agreement with Turkey, here it should be read as the form of agreement that prepares for accession to the EU, see: M Cremona 'External Relations and External Competence of the European Union' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (Oxford University Press, Oxford 2011), p 238 fn 99.

8 Referral can be made to the general proposal made by a group of developing states represented by India, requesting the creation of a GATS visa separate from the national rules applying to other forms of migration. One of the issues addressed in this proposal is the problem of treatment of temporary and permanent labour flows in the same national immigration procedure, see the overview provided in a factsheet on the ILO website: <http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=54> (last visited 1 October 2015). See extensively S Cho 'Development by Moving People: Unearthing the Development Potential of a GATS Visa' in C Thomas and JP Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press, Oxford 2009), chp 17.

those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders'. This regulatory autonomy is limited to the extent that 'such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment'.[9] This essentially means that the GATS does not affect immigration law, yet an immediate question then becomes, is the above described sponsorship still related to ensuring the orderly movement of natural persons across borders? Additionally, the EU's horizontal GATS Mode 4 commitments contain a general limitation, which is referred to as a blanket reference: '[a]ll other requirement of [Union] and Member States' laws, regulations and requirements regarding entry, stay and work shall continue to apply'.[10] On the basis of this limitation, the above described regime may simply be part of the GATS Mode 4 commitments. Yet this approach will lead to problems. As an example, the duration of residence and stay for intra-corporate transfers and business visitors undefined in the Uruguay Round commitments is left undefined. In theory, the Dutch legislation may change at any moment, including a change to a duration of one day. These important issues will not be addressed in this chapter, as they are relevant to the UK implementation of GATS Mode 4 commitments as well. The legal analysis of these issues is therefore left to the final chapter.[11]

Regarding the implementation of EU obligations, the main problems identified concern issues for posted workers and EU citizens still facing restrictions based on the accession Treaties.[12] Case law from the European Court of Justice clarifies that posted employees of service providers are granted derived mobility rights irrespective of their nationality. The Netherlands (and various other EU Member States, including the UK) demonstrates strong reluctance to accept this form of movement when the posting concerns transition citizens or third-country nationals. Additionally, service provision by self-employed transition citizens in itself is a sensitive issue in the Netherlands. This sensitivity is apparent from concerns over so-called bogus self-employment, labour movements under the guise of self-employment.

Paragraph two first describes the entry rules and the residence and work permit obligation in general in relation to access to the labour market for third-country nationals. This is necessary as service provision under the GATS falls within this legal regime. Paragraph three will provide an overview of the Dutch GATS Mode 4 commitments and the rules which form their implementation. Paragraph four will contain an analysis of the rules relating to GATS Mode 4 movements.

9 See further chapter 2, par 2.5.3.2.
10 Chapter 2, par 2.4.1.
11 Chapter 7, par 7.5.3.
12 Chapter 3, par 3.4.2.

5.2 Dutch immigration and labour market rules for third-country nationals

Three major problems arise from the choices made when implementing international obligations derived from GATS Mode 4 and the EU. First, GATS obligations relate to service provision, yet the implementation of these obligations is adopted in a regime that addresses labour migrants. Second, the introduction of sponsorship and its application to GATS service providers, is problematic. Third, GATS aims at transparency of domestic rules. However, the regime implementing the GATS relies on an Act with no less than three levels of delegated legislation, the last of which concerns policy guidance which is a problematic form of legislation on its own. It is not easy to locate and identify GATS mobility rights and the conditions under which these apply within this legal system.

5.2.1 Introduction

The Aliens Act 2000 and its respective delegated legislation, regulates the right of aliens to enter and reside in the Netherlands.[13] The regulatory scheme applying to the right to pursue an economic activity is more fragmented. An important part can be found in the Aliens Employment Act and accompanying delegated legislation, which regulates access to the Dutch labour market for aliens not enjoying the free movement rights derived from EU law.[14] At a first glance the legal rules relating to entry to, residence in, and the right to pursue an economic activity in the Netherlands are rather complex. Provisions containing conditions, and exceptions to them, can be found in several Acts and layers of delegated legislation. This can be explained as various differing entry schemes exist which relate to combinations of the purpose of entry and the nationality of the migrant. These entry schemes are the consequence of both international obligations as well as national policy.[15] Mi-

13 The Aliens Act follows a structure which establishes basic rules through an act (*formele wet*), the details of which are delegated to a lower level of government (*Algemene Maatregel van Bestuur* or *AMvB*). On several occasions the rule making process is left to a third level of government (*ministeriële regeling*). Finally, various policy rules are contained in implementation guidelines (*circulaires*), an instrument which contains policy norms and can be seen as guidance rules directed at the authorities charged with the effectuating of the specific rules. This leads to the following legal structure: Aliens Act (AA, *Vreemdelingenwet 2000*, formele wet) – Aliens Decree (AD, *Vreemdelingenbesluit 2000*, AMvB) – Regulations on Aliens (RoA, *Voorschrift Vreemdelingen*, ministeriële regeling) – Aliens Act Implementation Guidelines (AA Implementation Guidelines, *Vreemdelingencirculaire*, circulaire).

14 The AEA follows the same delegation approach as the Aliens Act, which leads to the following legal structure: Aliens Employment Act (AEA, *Wet Arbeid Vreemdelingen*, formele wet) – Decree Effectuating AEA (DEAEA, *Besluit Uitvoering Wav*, AMvB) – Regulation Effectuating AEA (REAEA, *Regeling uitvoering Wav*, ministeriële regeling) – Effectuating Rules Regulation Effectuating AEA (Effectuating Rules REAEA, *Uitvoeringsregels behorende bij de artikelen 2, 6, 7 en 8 van de Regeling uitvoering Wet arbeid vreemdelingen, circulaire*).

15 The term entry scheme is chosen to capture all legal entry routes resulting from these combinations of nationality and purpose of entry and residence. Several of these schemes can be identified as such in the Acts, while others are the result of non-specified mobility rights for nationals of specific countries. For example, there are specific provisions dealing with entry for third-country national scientists enjoying mobility rights as the result of Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third- →

gration law and policy in general is a field of law that is strongly used to find solutions for politically formulated problems. Consequently, societal developments, which determine political aims, have a heavy influence on migration law. The Dutch regulatory system relating to migration is therefore subject to frequent changes, making it important to keep a focus on the underlying themes. While this may be inherent to a policy area considered sensitive in the political arena, international obligations have an interesting role to play in this policy field as they restrict the possibilities to unilaterally change the existing rules.[16] As such, they form a minimum level of guarantees against these changes.

The potential complexity of the Dutch legal system regulating economic migration is reduced by the fact that the conditions are mostly formulated as general rules. These can apply in full to some entry schemes, while exemptions to one or more conditions apply to others. As such, each entry scheme comes with a varying list of conditions which needs to be complied with. Depending on the Dutch interest; some categories of aliens have easier access conditions than other categories. Dutch policy is in many respects, and increasingly, shaped and bound by EU law and other international trade agreements. In particular EU law has restricted national measures regarding topics that were unforeseen or in relation to topics on which the Member States want to regain autonomy. The concept of posted workers, as well as the consequences of the Turkish Association Agreement do not always sit well with contemporary policy, politicians and society.[17] The least restrictive regime is the one applying to EEA nationals. The regime applying to transition citizens is more restrictive due to the application of the AEA work permit obligation. In comparison with the full regime applying to third-country nationals, residence and work permit obligations and the application of an economic needs test, the GATS mode 4 regime is limited to the abolition of the economic needs test imposed on third-country nationals.

5.2.2 The Aliens Act and the Aliens Employment Act

The various legal grounds for residence are categorized into four main types of residence permits. A residence permit is either provided on the basis of regular grounds or on asylum related grounds. Furthermore, residence permits can be provided on a temporary basis or with unlimited duration.[18] The AA and the AEA

country nationals for the purposes of scientific research OJ (2005) L289/15, while a general right to entry and residence based on inter alia (self-) employment exists for EU nationals on the basis of the EU Treaties.

16 GG Lodder *Vreemdelingenrecht in Vogelvlucht. Over Toelating en Verblijf van Vreemdelingen in Nederland* (Sdu Uitgevers, The Hague 2011), p 15; C Grütters, R Fernhout, K Groenendijk, A Hekman, M Kullmann, P Minderhoud, R van Oers, T Strik and K Zwaan *Migratierecht* (Boom Juridische uitgevers, The Hague 2012), p 18; EJA Franssen *Wet Arbeid Vreemdelingen* (Kluwer, Deventer 2013), p 11.

17 Chapter 3, par 3.4.2 and 3.3.4.

18 Article 8 AA, these four main types of residence permits are defined in Articles 14, 20, 28 and 33 AA.

establish a residence and work permit regime with different conditions depending on the category the alien belongs to. The legal regime therefore varies depending on *inter alia* the economic activity, the nationality of the alien, the level of education or the remuneration level. As a consequence of the Single Permit Directive,[19] third-country nationals applying for residence to work in a Member State must now be issued with a single combined residence and work permit. However, this Directive exempts posted workers, intra-corporate transferees and self-employed service providers from its scope.[20] This was an opportunity to abolish the so-called *machtiging tot voorlopig verblijf* (MVV) which constitutes a provisional residence permit. The removal of the MVV was specifically recommended by the Dutch advising committee for alien affairs.[21] This would have led to a single procedure concerning entry and residence applying in general.[22] Instead, the single permit procedure is limited to those working as employees and aliens admitted as learning workers.[23] As such, the procedural changes resulting from the implementation of the Single Permit Directive are not applicable to the categories of aliens discussed in this research. This also applies to the equal treatment rights granted in the Directive to third-country nationals.

5.2.2.1 Entry

Entering the territory of a state is simply a matter of crossing the border. However, the legal right to enter the Netherlands is usually based on a decision of the Dutch authorities on the basis of EU law conditions.[24] The Dutch state's sovereignty regarding entry of its territory is heavily influenced by European Union law which provides almost unlimited entry rights for EU nationals, as well as visa criteria regarding third-country nationals.[25] With the Schengen Agreement and the Convention Implementing the Schengen Agreement, entry to the Dutch territory has mostly become a matter of international cooperation.[26] Since the Treaty of Am-

19 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State OJ (2014) L341/1.

20 Article 3(2)c, d and k Directive 2011/98/EU.

21 This independent committee is established on the basis of the AA, Article 2 AA.

22 Adviescommissie voor Vreemdelingenzaken *Mvv, Weg Ermee? Voorstel voor één Procedure voor Inreis- en Verblijfsvergunning* (Adviescommissie voor Vreemdelingenzaken, The Hague 2007). During an interview the remark was made that the fact that the request for an MVV and a residence permit requires the submission of exactly the same information is ridiculous, interview CapGemini NL (3 December 2010).

23 See in particular the explanation provided in the Effectuating rules REAEA, Annex I, par 1.

24 Grütters *et al* 2012, p 28. The conditions for entry are codified in Article 3 AA.

25 Kuijer *et al* 2005, p 43-44; Council Regulation 539/2001/EC of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ (2001) L81/1.

26 Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Dutch Treaty Series 1985 no 102; Convention implementing the Schengen Agreement of 14 June 1985 between →

sterdam, the Schengen rules are part of Union law.[27] Third-country nationals must have a valid travel document to cross the border.[28] Moreover, the EU Visa Regulation indicates the countries of which nationals require a visa in order to enter the Schengen area.[29] Additionally, third-country nationals are required to justify the purpose of their intended stay and must demonstrate compliance with the conditions applying to their stay. The Schengen Border Code provides a non-limitative list of documents serving as evidence.[30] Related to these conditions is the need to demonstrate sufficient means of subsistence or the legal manner in which to obtain such means, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted.[31] Entry can be refused on grounds of public policy, international security, public health or the internal relations of any of the Member States. A threat may be apparent when there is evidence that the alien will violate the public order or security, which includes political activities. A criminal record, a declaration of *persona non grata* or inclusion in the Schengen Information System register may also lead to the consideration that the alien forms a threat.[32] As the entry rules concerning third country nationals of the Schengen Border Code concern short stay only (three months), national law determines the conditions which apply to longer stay, including regular immigration for the purpose of providing services. However, the Dutch national rules concerning entry are mostly similar to the rules contained in the Schengen Border Code.[33]

The Schengen Border Code does not regulate rules concerning the right to perform labour during short stay, though several Member States do in fact use its rules for this purpose. Dutch national law indicates that third-country nationals are not allowed to perform labour contrary to the AEA.[34] While short stay does not lead to a residence permit, it still is possible for employers to allow an alien to work. To obtain a work permit for an alien, the alien normally requires a residence permit.[35]

---

the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. See for a thorough overview of the history of the Schengen Agreement: E Brouwer *Digital Borders and Real Rights* (Wolf Legal Publishers, Nijmegen 2006), chapter 2.

27 Lodder 2011, p 39; Kuijer et al 2005, p 44; Regulation 562/2006/EC of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders OJ (2006) L105/1.

28 Article 5(1) Schengen Border Code; AA Implementation Guidelines A2/4.2.1.

29 Regulation 539/2001/EC, preamble par 12 and Article 5, Annex 1 (list of countries whose nationals require a visa) and Annex 2 (list of countries whose nationals are exempted from the visa requirement).

30 Article 3(d) AA, as defined in Article 2.1. AD; Schengen Border Code, Annex 1.

31 Articles 2.10 and 2.11 AD ; AA Implementation Guidelines A2/4.2.3.2. Note that these conditions apply to short-term entry, the subsistence criteria for those wishing to obtain a regular temporary residence permit are different, see this chapter, par 5.2.2.2.

32 2.9 AD and AA Implementation Guidelines A2/4.2.

33 Article 3 AA; see also art 4.5 AD which obliges aliens to provide travel documents and information regarding the purpose and duration of stay, as well as evidence concerning the means of support.

34 Article 12 AA; Lodder 2011, p 37.

35 This chapter, par 5.2.2.4.

However, an employer can apply for a work permit for an alien legally present in the Netherlands during a short stay. This work permit has a maximum duration of 12 weeks.[36]

5.2.2.2 Residence permit

The general regime applying to aliens wishing to provide services in the Netherlands requires the alien to obtain a temporary regular residence permit, either as an employed person (posted worker or intra-corporate transferee) or as a self-employed person. The purpose of residence is important as the conditions for granting a residence permit are connected to it. Moreover, the residence permit is granted for stay relating to that purpose only. Thus, if a student wants to change the purpose of stay, for instance to perform labour, an application to change the residence permit to the new purpose is required.[37] While each purpose of stay leads to different requirements, several general conditions apply to all temporary residence permits.[38] Negatively formulated, an application can be refused under several circumstances, which include those relating to entry such as not being able to demonstrate travel documents and forming a threat to the public order. The conditions that are relevant to the topic at hand are the requirements of a Regular Provisional Residence Permit, sufficient means of subsistence, performing labour in contravention to the AEA and failure to submit a statement of sponsorship.

Regular Provisional Residence Permit and Residence permit

The condition of possessing an MVV is the counterpart of the visa requirement for aliens wishing to stay for a period shorter than three months. Aliens wishing to reside in the Netherlands for a period longer than three months require an MVV.[39] An MVV is provided by diplomatic or consular representatives outside the Netherlands. The MVV is a temporary entry visa linked to the purpose of the definitive residence permit, and will therefore be provided only if the alien is entitled to residence based on that purpose.[40] Documents may be required depending on the purpose of residence. If, for instance, the alien will reside in the Netherlands on the basis of an employment contract, the contract itself and evidence of relevant degrees and qualifications need to be provided.[41] The alien will also need to pay a

36 Lodder 2011, p 51; Article 1, sub a DEAEA and AA Implementation Guidelines B5/5.4.1.
37 Article 14(2) AA.
38 Art 16 AA.
39 Article 1(h) AA provides the definition of an MVV. See more extensively AEA Implementation Guidelines (B)1. Various exemptions apply: *inter alia* EU nationals, EEA nationals. See for an overview Article 17 AA, Article 3.71 AD and AEA Implementation Guidelines (B)4.1.1.
40 Article 3.18 AD, see also Lodder 2011, p 60.
41 The standard forms can be found online on: <https://ind.nl/en> (last visited 1 October 2015).

fee. The duration of the temporary regular residence permit is connected to the residence purpose.[42] The main rule is that a work permit is granted for the duration of one year, as an exception the maximum duration is three years.[43] However, a residence permit granted in relation to labour (in the broad sense, thus including service provision) may be granted for the duration of the work permit.[44] For EU posted workers, the duration of the residence permit is similar to the duration of the service activities, however, the maximum duration is two years, without the possibility of extension.[45] This means that Dutch legislation limits the possibility to post third-country national workers to execute a service contract to two years. Similarly, for self-employed persons the maximum duration of the residence permit is two years.

Sufficient means of subsistence

Aliens entering the Netherlands need to demonstrate that they have sufficient means for the duration of their stay in the Netherlands, as well as the means to travel to a country which will admit the alien at the end of the period of their stay. Means of subsistence have to be personal, sufficient and lasting. Personal entails that it is the alien who obtains them or has the availability over them, for instance through (self-) employment.[46] The AD links the amount required to the Dutch minimum wage act.[47] Means of subsistence are considered to be lasting if they are available for at least a year after the moment of receiving the application for the residence permit. The same applies to means that were sufficient and available at least three years before the date of receiving the application and will be available for a half year after that date.[48] Exceptions to this one year rule apply concerning employees who work on a flexible basis and employees who are employed by an employment agency.[49]

Performing labour contrary to the AEA conditions

The Aliens Act and the Aliens Decree clarify the relationship between residence permits and work permits in situations where both are required. The AA requires

42 MAG Reurs *Tekst en Toelichting Modern Migratiebeleid* (Sdu Uitgevers, The Hague 2014), p 169.
43 Article 11 AEA.
44 See also: E van Wissekerke *Regulier verblijfsrecht* (Boom Juridische uitgevers, The Hague 2011), p 90. Renewing the residence permit each year is therefore no longer required, T de Lange *Staat, Markt en Migrant. De Regulering van Arbeidsmigratie naar Nederland* (Boom Juridische uitgevers, The Hague 2007), p 270.
45 Article 3.58 and 3.59 AD.
46 Lodder 2001, p 62; Article 3.73 AD and AA Implementation Guidelines B1/4.3.
47 Article 3.74 AD referring to: Wet van 27 November 1968, houdende regelen inzake een minimumloon en een minimum vakantiebijslag (minimum wage Act), Article 8.
48 Article 3.75(1) AD.
49 Article 3.75(3) AD.

the Dutch authorities, the IND, to provide a labour migrant with a residence permit if a work permit has been granted. Thus, foreigners who have the right to work in the Netherlands can only be refused a residence permit if the foreigner is a threat to the public order.[50] *Vice versa*, a residence permit will be refused or withdrawn[51] if the aliens performs labour for an employer contrary to the conditions of the AEA. Providing services for another falls within the scope of the Dutch definition which determines whether a work permit obligation applies. Therefore, the AEA is relevant regarding the specific temporary residence permit granted for the purposes of international service provision, warranting an extensive description in addition to this overview.[52]

Statement of sponsorship

A residence permit may be refused if the aliens does not have a sponsor where such is required on the basis of the residence purpose. For GATS Mode 4 service suppliers this is indeed the case. Sponsorship is expressed in the form of a statement of sponsorship, without which the migrant will not be able to obtain a residence permit. This feature of Dutch migration law has various relevant consequences. It is also the main obligation applying to GATS Mode 4 movements which arguably no longer relates to the immigration exception provided in the Annex Movement of Natural Persons. Sponsorship will therefore be discussed extensively in the following paragraph as well as in the concluding analysis of this research.[53]

5.2.2.3 Sponsorship

In June 2013, the Act modern Migration Policy entered into force.[54] This Act introduces a sponsorship obligation into Dutch migration law. The person or organization that has an interest in the migrant, the university in the case of a student, the

50 Article 3.31, par 1 AD; De Lange 2007, p 270.
51 Article 19 and 18(1) under g AA.
52 This chapter, par 5.2.2.4.
53 Chapter 2, par 2.5.3.2; chapter 7, par 7.5.3.
54 Wet modern migratiebeleid en het Besluit modern migratiebeleid Stb (2013) 165. The publication Reurs 2014 and the overview it provides is frequently relied on in this paragraph. Several publications provide useful summaries of the consequences resulting from the introduction of sponsorship. See for instance: OJDM Jansen 'De Referent als Boeteling. Bestuursrechtelijke Sanctionering in de Wet Modern Migratiebeleid' (2010) 1:5 *Journaal Vreemdelingenrecht*; S Groen, T de Lange, K Grootfaam, N Kruidenberg and G Leeuwis 'Wet Modern Migratiebeleid: Overheid en Referent' (2013) 4 *Asiel & Migrantenrecht*; general summaries of the consequences resulting from the modern migration policy are available as well, see for instance: J Kroes 'A Modern Migration Policy for the Netherlands' (2010) 15:2 *IBA Immigration and Nationality Law News*; H Entzinger 'De Echte Dilemma's van een Modern Migratiebeleid' (2007) 9 *Migrantenrecht*, p 369-372; E Koopmans and M Goudriaan 'Naar een Modern en Europees Migratiebeleid' (2008) 2:31 Journaal Vreemdelingenrecht; AP Taselaar 'Het Wetsvoorstel Modern Migratiebeleid' (2009) 4:22 *Journaal Vreemdelingenrecht*; FH van 't Hoogerhuys 'Naar een Modern Arbeidsmigratiebeleid' (2009) 4:23 *Journaal Vreemdelingenrecht*. See for an overview of consequences for the migrant: Groen et al 2013.

employer in the case of a labour migrant, and the service receiver in the case of service provision, will have to act as the sponsor of the migrant.[55] The Dutch authorities enter into a legal relationship with the sponsor. Both legal and natural persons can be recognized as sponsors but the sponsor needs to have sufficient interest to act as sponsor in a particular case. As a result, from a GATS Mode 4 perspective, the sponsor will be the service receiver, or the receiving company, in the case of an ICT transfer. As will be discussed in the next chapter, the Points-Based system in United Kingdom migration law relies on a similar principle in relation to third-country national migrants.[56]

While the language used indicates that a residence permit *may* be refused without a declaration of sponsorship, this does not diminish the obligation where sponsorship is required. The used language simply refers to the fact that not all purposes of residence require a sponsor.[57] Without a declaration indicating the willingness of the sponsor a residence permit will be refused. An important feature of sponsorship is that sponsors must accept several obligations. These obligations include providing information to the authorities, record keeping, as well as responsibilities relating to some of the migrants actions. Failure to observe these obligations may result in administrative fines as well as criminal proceedings.

One of the central aims of the introduction of the Act is to ensure that migrants who are needed in the Netherlands are admitted in a fast and simple procedure.[58] The underlying blueprint of the Act indicates that 'migration policy can no longer be only restrictive – it also has to be selective'. The ambition is 'to make the Netherlands more attractive for high-level knowledge workers and talented scientists, and to respond more closely to the needs of Dutch society, companies and knowledge institutes'.[59] The notice further indicates that '[w]ithin this new admission model there will, of course, always be room for admission on the grounds of international obligations (...) but this migration will be subject to the existing strict frameworks'. Sponsorship should lead to awareness for sponsors of the responsibilities of regular migration and the consequences for society.[60]

Two types of sponsors can be distinguished, a normal sponsor and a recognized, or perhaps better, trusted sponsor.[61] For some migration purposes, recogni-

55 Respectively: Article 1.13 AD; Article 1.10 and Article 1.10 under b and c AD.
56 Chapter 6, par 6.2.2.4. The Dutch terminology is: 'verklaring van een referent'. The translation sponsorship is deliberately used here to draw a parallel with UK migration law.
57 See for instance Article 3.42 AD relating to students that have obtained a higher education degree (master or PhD) and are searching for work. Paragraph 4 indicates that a declaration of sponsorship is not required.
58 Dutch Parliament, *Kamerstukken II*, 2008/09, 32 052, Nr 3 (Memorie van Toelichting), par 1. See also: S Groen et al 2013a, p 184, referring to Dutch Parliament, *Kamerstukken II*, 2009/10, 32 052 D, p 1.
59 Dutch Ministry of Safety and Justice, government notice 'Naar een modern migratiebeleid' (2007) ve06000709.
60 Dutch Ministry of Safety and Justice 2007, preface; *Kamerstukken II*, 2008/09, 32 052, Nr 3, par 1.
61 Article 1 under s and t AA.

tion is obligatory, however, this is not the case for service providers.[62] The main difference between the two lies in the availability of a fast-track procedure for recognized sponsors. Due to the trusted status of a recognized sponsor, there is no need to resubmit all required information for each entry procedure (residence or work permit). This means a much thinned down application is possible. The relevant authorities will, instead of checking all information beforehand, rely on post-entry checks and sponsors must be able to produce required documents if requested. This procedure seems more logical, as inspection will take place sometime after the alien has resided in the Netherlands for a certain period, possibly contrary to the conditions attached to the residence permit.[63] This faster procedure fulfils a strong need of business, in particular those relying often on third-country nationals.[64] The benefits of the new policy only apply to recognized sponsors, whereas the additional obligations resulting from sponsorship apply to both types of sponsors.[65] The starting point for sponsorship in relation to labour migrants is that the sponsor is a legal person as well as inscribed in the registry of commerce.[66] As indicated by Reurs, it is logical that the Modern Migration Policy, which has as one of its aims to avail itself of already existing information, is linked to the registry of commerce.[67] As legal persons may not have an establishment in the Netherlands, it is possible to rely on a Dutch commercial agent who has been authorized to act as the sponsor for the foreign legal person.[68]

Recognized sponsors

As indicated, recognized sponsors can rely on fast-track procedures. The recognized sponsor status is granted by the IND if certain conditions are fulfilled. As several of these conditions relate to a clean track-record (for instance, in the case of labour migration, no offences relating to illegal immigration) and require the submission of additional information, the sponsor is thereafter 'trusted' by the government, which in turn leads to faster applications relating to sponsorship.[69] A

62 As this obligation is not applicable to labour migrants, which includes service providers, Reurs 2014, p 2, referring to: *Kamerstukken II*, 2009/10, 32 052 D, p 7-8; see also: *Kamerstukken II*, 2008/09, 32 052, Nr 3, p 62.

63 Interview IND (1 February 2011).

64 Interview Philips (2 December 2010) and interview PriceWaterhouseCoopers (7 December 2010).

65 Groen *et al* point to the problem of increased dependence of the migrant on the sponsor, Groen et al 2013b, p 192.

66 Article 2a(1) under c AA. This provision refers to the registry as indicated in Article 2 Wet van 22 maart 2007, houdende regels omtrent een basisregister van ondernemingen en rechtspersonen (commerce register Act) *Stb* (2007) 153.

67 Reurs 2014, p 5; see also: Article 2d(1) AA which indicates that information relating to the request to act as a sponsor will not have to be provided by the applicant if the government can obtain this information itself from governmental administrations. The administrations selected can be found in Annex 20 (relating to sponsorship) and 21 (relating to conditions of residence) of the RoA.

68 Reurs 2014, p 5.

69 This is apparent from the conditions contained in Article 2e(1) AA, see also: Jansen 2010, par 2 and Reurs 2014, p 14-15.

natural person cannot act as a recognized sponsor. Only legal persons that are inscribed in the Dutch commerce registry can be accepted as recognized sponsors.[70] The argument then is, that the continuity and trustworthiness of legal persons not inscribed in the registry is doubtful.[71] This argument is valid in relation to Dutch legal persons, however, for one-time, or occasional service receivers, it is much less relevant. Additionally, a one-time administrative fee of 5000 euro is due.[72] Several conditions relate to the reliability of the legal person and its personnel, including the continuity and solvability of the legal person.[73] Reliability also applies to legal and natural persons directly or indirectly linked to the legal person.[74] If the status as recognized sponsor of the applicant, as well as that of legal and natural persons directly or indirectly linked to the legal person, was withdrawn less than five years ago, the application may be refused.[75] In general, this means that previous violations of relevant Acts such as the AA, the AEA and the Act minimum wages, may all lead to refusal. However, these conditions are minimum guarantees, which means that reliability may be questioned on other grounds.[76] Finally, the application will be rejected if the conditions relating to the purpose of the sponsored migrant's residence are not fulfilled.[77] The procedure is required only once[78] and grants the recognized status in relation to one residence purpose, for instance labour migration. The status has an unlimited duration, however, it may be suspended or withdrawn.[79]

Sponsorship duties

Accepting sponsorship will lead to administrative duties, information duties and a duty of care in relation to the migrant. These obligations apply to both recognized and normal sponsors. The sponsor has the obligation to inform the authorities, within four weeks,[80] when he knows, or can reasonably assume, that the alien no longer fulfils the conditions under which a residence permit is granted.[81] The information that must be submitted relates to important changes, such as a change

70 Article 2e(2) AA; Article 2a(1) under a AA, an exception applies for legal persons that cannot be inscribed in the registry of commerce such as religious organizations, Article 1.12 RoA.
71 Reurs 2014, p 5.
72 Article 1.11 RoA.
73 See for a more extensive overview of these conditions: Reurs 2014, p 14-17.
74 Article 2e(1) under b and c AA. See also Article 1.18 and 1.19 AD. Details can be found in Article 1.13 RoA which requires information provided by the tax administration indicating that taxes have been paid, and that there were no problems relating to tax payment in the past.
75 Article 2e(1) under d AA.
76 Groen et al 2013a, p 188; Reurs 2014, p 16-17 and p 266-267.
77 Article 2e(1) under e AA.
78 See also Article 2d AA which indicates that normally information relevant to the recognition has to be submitted only once.
79 Article 2c AA.
80 Article 4.17 RoA.
81 Article 4.44a AD.

of employer in the case of labour migration.[82] This may also include a yearly report indicating that the alien still fulfils the conditions relating to the required permits.[83] The information duties also relate to other relevant changes,[84] the manner in which the sponsor fulfils its caretaking responsibilities regarding the alien, as well as to his position as a sponsor.[85] The sponsor must also keep an administration.[86] This administration relates to the sponsored alien, the upholding of the sponsors obligations, the sponsors position and the sponsors responsibilities as provided in the various layers of legislation.[87] This administration must include a record of the place of residence of the alien.[88] For labour migrants the original work permit, the employment contract and the specifics of the wage must be included.[89] In order to uphold these duties, the sponsor must request relevant information from the alien, though this is limited by the phrase: to the extent that the private life of the migrant is not unreasonably infringed.[90] All such information must be available for inspection for five years after the end of the sponsorship relation.[91] The duties of care entail that the sponsor must take care when selecting an alien, for labour migration, in order to prevent (future) breaches of the law.[92]

Sanctions

Failing to observe these duties will lead to administrative fines as high as 3000 Euro per incident, with the possibility of a 50% increase in case of repeated offenses.[93] Criminal sanctions may be imposed whenever a sponsor has to certify that provided information is correct, or when information, administration and caretaking obligations are breached. These sanctions may lead to a maximum of six months of imprisonment.[94] In practice, these sanctions are going to be imposed on the following basis.[95] A first offence will lead to a warning, a second to a fine, a third to a fine increased with 50% and the fourth offence will lead to criminal

82 Reurs 2014, p 244-245; Article 4.22 RoA indicates the specifics relating to labour migration which are: a change in employer, no longer fulfilling the income conditions or a change in the type of labour.
83 Dutch Parliament, *Kamerstukken II*, 2008/09, 32 058, Nr 3 (Memorie van Toelichting), p 10-11.
84 For instance that the alien no longer resides in the Netherlands, see Article 4.18 RoA.
85 This follows from Article 4.44a AD, 4.44b(3) AD, see Reurs, p 273. See for a more extensive overview of the information duties: Jansen 2010, par 3.
86 See for an overview: Jansen 2010, par 2.
87 Article 4.53 AD.
88 Article 4.27 RoA.
89 Article 4.34 RoA.
90 Article 4.53(3) AD.
91 Article 4.53(4) AD. The administration must be kept in the office of the sponsor, Article 4.41 RoA.
92 Kroes 2010, under 'obligations'. Note that for several types of regular migration the sponsors will have to comply with codes of conduct, however, this does not apply to labour migration. See: Taselaar 2009, par 6.1.
93 Groen et al 2013a, p 190; see for the parliamentary report regarding these fines Dutch Parliament, *Kamerstukken II*, 2008/09, 32 058, Nr 7, par 2.5. See also Kroes 2010. For an extensive description of the consequences of sanctions in relation to sponsorship, see: Jansen 2010, par 4.
94 Article 108 AA.
95 Jansen 2010, par 4; Groen et al 2013a, p 190; *Kamerstukken II*, 2008/09, 32 058, Nr 3, p 19.

sanctions.[96] Moreover, sponsors may also incur additional costs. In cases where the alien is expelled from the Dutch territory, the authorities have the option to claim the costs involved with the expulsion from the sponsor.[97] As indicated, the reliability of directly or indirectly involved (legal) persons may have consequences as well. As pointed out by Groen *et al*, this means that, for example, the actions of one branch office may result in the loss of recognized sponsorship for the entire concern.[98] A renewed recognition may be refused up to five years due to past irregularities.[99]

5.2.2.4 The Aliens Employment Act and work permits

The Aliens Employment Act regulates access to the Dutch labour market for aliens.[100] The adopted method is a work permit system directed at employers. The central provision of the AEA prohibits employers to allow a foreigner to supply labour in the Netherlands without a work permit.[101] The aim of controlling access for aliens to the Dutch labour market is mainly achieved through the broad definition of the term employer incorporated in the AEA, coupled with significant fines in scenarios where employers have not obtained a work permit for the alien providing labour. Due to the definitional difficulties in the international legal order regarding the dividing line between service provision and labour, certain activities can be classified as labour by the Dutch labour inspectorate, and Dutch courts, whereas the activity actually concerns service provision. Naturally, the opposite holds true as well, providing labour may be wrongfully classified as service provision, leading to access to the labour market in contravention to the international rules.

The AEA defines an employer as:

> anyone who in the exercise of office, a profession or a company, allows another person to perform labour; and a natural person who allows another person to perform domestic or personal services.[102]

The AEA definition of an employer does not require an employment agreement, any form of authority, remuneration or duration. As is apparent from case law, it is enough that a business owner does not prevent another person to perform labour.

96 Jansen 2010, par 4; *Kamerstukken II*, 2008/09, 32 058, Nr 3, p 19.
97 Article 65(2) and 66 AA in combination with Article 5.2 AD. See for a detailed description Reurs 2014, p 252-255.
98 Groen *et al* 2013a, p 191.
99 Article 2f and 2g AA, see also: Reurs 2014, p 17-20.
100 Dutch Parliament, *Kamerstukken II*, 1993/94, 23 574, Nr 3 (Memorie van Toelichting), p 4. For a historic overview of the AEA see: Franssen 2013, chp 2.
101 Article 2, par 1 AEA.
102 Article 1 under b AEA. This definition includes the Dutch government, EJA Franssen 'Het werkgeversbegrip in de Wet arbeid vreemdelingen: breder kunnen we het niet maken' (2012) 17 *ArbeidsRecht*, referring to: *Kamerstukken II*, 1993/94, 23 574, Nr 3, p 4, and Raad van State 12 May 2010 ECLI:NL:RVS:2010:BM4167.

As long as the labour performed relates to the specific business, the owner is considered to be an employer within the meaning of the AEA.[103] This definition was adopted to prevent avoidance of the work permit obligation. Additionally, it specifically serves to ease the burden of providing evidence of an employment relationship for the competent authorities.[104] While intention, duration and remuneration play no role in determining an employment relationship within the meaning of the AEA, the labour provided does need to be directed at the type of business. Foreigners cooking their own dinner in a restaurant are not considered to be employees, as the activity does not fall within the business activity.[105] The AEA definition of employer is much wider than the definition used in Dutch labour law and European law which additionally require remuneration, a degree of authority over the employee by the employer and some duration of the employment relationship.[106] Exemplary of this broad definition was the situation where a visiting Turkish national helped his brother out by cutting away burning meat in his kebab restaurant. This was deemed to be an employment relationship. The consideration that the brother was only visiting for a week, as was evident from his plane ticket, did not alter the decision, though it did lead to a lowering of the fine.[107]

Those who hire the services of a company also fall within this definition.[108] As such, if a natural person hires a construction company to renovate a house, and that company avails itself of labour without obtaining a residence permit, the natural person breaches the AEA. The same holds true for personnel provided by recruitment agencies[109] and situations of sub-contracting.[110] If the recruitment agen-

103 AEA; J van Drongelen, PJS van den Bogaard and ADM van Rijs *Commentaar Wet Arbeid Vreemdelingen* (Sdu Uitgevers, The Hague 2005), p 30-31; AP Klap and T de Lange 'Marktordening via het werkgeversbegrip van de Wet arbeid vreemdelingen' (2008) 10 *SMA Tijdschrift over Arbeid en Sociale Zekerheid*, par 3.

104 Klap and de Lange 2008, par 2.1 and 2.3; their contribution provides an extensive explanation of the broad definition of employment and the manner in which the AEA controls access to the Dutch labour market.

105 Klap and de Lange 2008, par 4; ABRvS 23 July 2008 ECLI:NL:RVS:2008:BD8353 (two Chinese nationals cooking their own dinner, not considered to be employees); ABRvS 16 January 2008 ECLI:NL:RVS:2008:BC2314 (two Chinese cooking, this time considered to be employees); ABRvS 28 November 2007 ECLI:NL:RVS:2007:BB8933 (owner of a cafeteria and a foreigner cooking dinner in a kitchen separate from the cooking facilities of the cafeteria, not considered to be an employment relationship). See also: Rechtbank Arnhem 17 March 2008 ECLI:NL:RBARN:2008:BC9415 (foreigners present in kitchen of a restaurant, no labour was performed, thus no employment relationship) and ABRvS 5 March 2008 ECLI:NL:RVS:2008:BC5804 (Polish national merely present in an attic containing tools, no proof of labour being performed, thus no employment relationship); Rechtbank Den Haag 30 August 2007 ECLI:NL:RBSGR:2007:BB4492 (two foreigners were found washing clothes and folding sheets in a self-service launderette, one claiming to do his own laundry, the other admitting to aiding the owner in exchange for free use of the launderette, the first was not considered to be an employee, while the second was. This case demonstrates the need for the authorities to provide evidence of performed labour).

106 Article 7:610 Dutch Civil Code. Chapter 3, par 3.3.2.1. See also: Franssen 2012, par 1.

107 Example provided in: Klap and de Lange 2008, par 3.3, see: Rechtbank Utrecht 22 November 2007 ECLI:NL:RBUTR:2007:BB9096; other case law examples are: ABRvS 1 August 2003 ECLI:NL:RVS:2003:AL6433; ABRvS 28 November 2007 ECLI:NL:RVS:2007:BB8942 (folding a pants in a clothing repair business was considered to be employment).

108 Franssen 2012, par 1.3.

109 Franssen 2012, par 1.1, referring as an example to Rechtbank Arnhem 25 May 2007 ECLI:NL:RBARN:2007:BB0608.

110 Franssen 2012, par 1.2, referring to ABRvS 12 March 2008 ECLI:NL:RVS:2008:BC6443.

cy or the original contractor use employees without work permits while this is required on the basis of the AEA, all companies involved are considered employers of the illegally employed employees. As noted by Klap and De Lange, the consequence of this broad definition is that even those who are unaware that they are considered employers within the meaning of the AEA are faced with significant fines. This is at odds with the normally present condition in Dutch law that one needs to be aware of breaching provisions where such a breach leads to fines.[111] Franssen also indicates that natural persons are usually not aware of the rules contained in the AEA. She concludes that the broad definition of the AEA therefore breaches Article 7 of the ECHR which requires that citizens must be able to predict, on the basis of clear and unambiguous legal rules, the consequences of breaching those rules.[112]

Klap and De Lange conclude that this control is too strict as it captures situations which have little to do with employment, including relatives preventing accidents which are then considered to be employees, the main problem being that individuals and businesses fall within the same definition. Moreover, this form of control could be counterproductive as the labour market can be disturbed by requiring contract suppliers to check all participating companies, hindering trust and causing a significant burden in complex large projects.[113] Tjebbes concludes that the broad definition of employer amounts to a form of strict liability with severe impact on both business and social life.[114] In 2011, the Ducht highest administrative court (Raad van State) ruled that applying the AEA to a lease company receiving the services of a car cleaning company which employed a Bulgarian national contrary to the rules of the AEA went too far. The AEA should not be stretched to cover random situations involving a receiver of goods or services without any legal or factual indication that the receiver should be considered as employer of the personnel (of the company) providing the goods or services.[115] Nevertheless, the legal definition of employer included in the AEA has not changed since this judgment, thus natural persons or companies involved in such situations need to rely on the courts to prevent fines.[116]

Due to the broad definition of employer, not only labour migration is governed by the AEA; service mobility falls within its scope as well. Firstly, the receiver of a

111 Klap and de Lange 2008, par 2.3. See in particular: ABRvS 11 July 2007 ECLI:NL:RVS:2007:BA9298, par 2.2 (employer unaware of relatives tending his store for 10 minutes upon request of another employee, still considered to be employment); ABRvS 2 April 2008 ECLI:NL:RVS:2008:BC8519, par 2.5 (employee of transport company requested aid from Turkish national when offloading cargo without knowledge of employer, considered to be employment).

112 Franssen 2012, par 1.3.

113 Klap and de Lange 2008, par 5; see also Franssen 2012, par 2.

114 M Tjebbes 'De kruistocht tegen werkgevers van illegalen. De boete bij overtreding van de Wet Arbeid Vreemdelingen' (2008) 8 *Migrantenrecht*, p 282.

115 Franssen 2012, par 2, referring to: ABRvS 21 September 2011 ECLI:NL:RVS:2011:BT2154.

116 Franssen 2012, par 2; naturally this is not ideal as judicial proceedings cost time and money.

service provided by an alien falls within the definition of employer as provided by the AEA. Consequently, in cases involving aliens, a work permit is required. The same holds true for service providers posting their workers on the Dutch territory and international concerns relying on intra-corporate transferees. The companies involved all allow an alien to perform labour on the Dutch territory, thus they fall within this definition of employer. All forms of service provision involving movement of natural persons covered by the GATS, with the exception of the business visitor customary category included in the EU horizontal schedule, therefore fall within the scope of the AEA.[117] These forms of service mobility need to meet all conditions attached to a work permit, unless the specific situation is covered by an exception. Exceptions can apply to the permit obligation itself or to the conditions attached to it. For example, for those who want to contract self-employed aliens who are already legally present in the Netherlands a work permit is not required.[118] Moreover, those who receive services from a self-employed person considered to serve a significant Dutch interest are exempted from the work permit obligation as well.[119] Conditions consist of the general Dutch conditions applying to operating the specific establishment[120] and sufficient means of existence.[121] A plan of business, based on an extensively financial plan, a management plan and a commercial plan is also required.[122] Whether a significant Dutch interest is served is determined on the basis of a point based system which indicates whether such interest exists regarding public health, the economy, culture or regarding a socio-economic interest.[123] Points are granted *inter alia* in relation to personal experience, the business plan and the added value of the specific economic activity for the Dutch economy.[124] The application for a work permit must be submitted by employers to the relevant authority, the Uitvoeringsinstituut Werknemersverzekeringen (hereinafter: UWV).[125] A work permit is required irrespective of the duration

117 Chapter 2, par 2.4.2.
118 Effectuating Rules REAEA, par 5.
119 Article 3.30(1) sub a AA.
120 Article 3.30(1) chapeau and under c AD.
121 Article 3.30(1) chapeau and under b AD.
122 AA Implementation Guidelines B5/7.3.3.
123 Reurs 2014, p 267-270; Van Wissekerke 2011, p 98; RoA Article 3.20a. Details can be found in Annex 8a RoA; AA Implementation Guidelines B5/7.1; Beleidsregels van de minister van Economische Zaken of 13 October 2010 houdende een puntensysteem voor de advisering over de toelating van vreemdelingen als zelfstandig ondernemer in Nederland WJZ/9201649 (Policy Guidelines self-employed aliens).
124 Policy Guidelines self-employed aliens 2010, Article 1 chapeau and under e; Van Wissekerke 2011, p 98-99.
125 Article 5 AEA provides that the minister of social affairs and employment has the authority to grant, refuse and extend work permits. The competence to grant, extend and withdraw work permits is delegated to this authority in Article 1 REAEA. Article 4:2 Algemene wet Bestuursrecht (Awb) indicates that an application must be signed and contain at the least: the name and address of the applicant, the date of signing and an indication as to what kind of decision is requested. For a work permit application Article 7 AEA adds a description of the place and type of labour to be performed.

of the stay, including a stay of one day,[126] and it is granted for a maximum of three years. While it is possible to extend the work permit application, it is important to estimate the duration of the labour when requesting a work permit. If a certain project takes longer than anticipated a new procedure to obtain a work permit may be required.[127]

The broad definition in the Dutch legal order entails that service provision by aliens, unless exempted, will fall within the regime that ensures the protection of (permanent) access to the labour market. The results of service trade liberalization derived from the EU legal order are implemented outside the framework of the AEA. However, GATS liberalization is implemented in the form of exceptions to the general rules contained in the AEA.

5.2.2.5 Work permit refusal grounds

The AEA provides several imperative refusal grounds and discretionary refusal grounds regarding a work permit request. Together with the exceptions to the work permit obligation, these grounds therefore form the conditions under which aliens may perform labour in the Netherlands.[128] The most important ground for refusal is availability of priority enjoying labour,[129] also known as an economic needs test.[130] The term priority enjoying labour relates to Dutch citizens and *inter alia* citizens of states that enjoy free movement rights in the European Union, EU citizens, EEA state citizens and Swiss nationals. It also includes foreigners who have a residence permit with a notification of free entry to the Dutch labour market. Thus, if the specific labour required by the employer requesting a work permit for a foreigner can be fulfilled by labour from these categories, the application must be refused by the UWV.[131] In other words, Dutch nationals, foreign nationals that have access to the Dutch labour market and foreign nationals that are part of the internationally shared European labour market all form the Dutch pool of priority enjoying labour.[132] The liberalization provided by the Dutch Mode 4 commitments essentially entails that the priority enjoying labour test will not be applied to the categories included in these commitments.[133] Article 9 AEA contains several optional refusal grounds relating to the availability of priority enjoying la-

126 Blaakman, Driece and de Lange provide the example of a concert by a foreign musician which requires work permits for the musician, the band and the entire crew, R Blaakman, R Driece and T de Lange *Vreemdelingen in Nederland aan het Werk* 2001 (Kluwer, Deventer 2001), p 18.
127 Effectuating Rules REAEA, par 9. See also: Blaakman, Driece and de Lange 2001, p 57.
128 Articles 8 and 9 AEA.
129 Article 8 AEA.
130 See Article XVI GATS, chapter 2, par 2.5.1.1.
131 Article 1 AEA in conjunction with Articles 3, par 1(a) and 4, par 1 AEA; Drongelen, van, Bogaard, van den and Rijs, van 2005, p 126-127.
132 *Kamerstukken II*, 1993/94, 23 574, Nr 3, p 16. See also: Effectuating Rules REAEA, par 10.
133 Described extensively in this chapter, par 5.3.

bour. Examples are that the work permit can be refused if the employer offers labour conditions which are lower than what is usual in the specific sector.[134] A work permit may also be refused if no evidence of adequate accommodation for the alien has been provided.[135] The UWV may also reject a work permit application if the applicant is not able to demonstrate sufficient effort in trying to fulfil the job position from the available pool of priority enjoying labour. In order to allow priority enjoying labour to respond to a job position, it has to be notified to the UWV five weeks before the submission of the application. Moreover, the employer has to demonstrate significant efforts made to fulfil the position with priority enjoying labour before a work permit for an alien is granted.[136] As the Uwv has five weeks to decide whether to grant or refuse a work permit, the total duration of a work permit application can take up to ten weeks.[137] From these grounds the value of the provided GATS Mode 4 commitments can be deduced, as this test entails a considerable burden.

Besides refusal based on this economic needs test, an application must be refused if the alien does not have a required visa or residence permit,[138] the alien is admitted for the first time but does not earn the Dutch minimum wage or the labour does not serve the Dutch interest.[139] The minimum wage requirement[140] serves several purposes. In the first place, it prevents that on the one hand a residence permit is rejected on the basis of insufficient funds while a work permit is granted. Moreover, the minimum wage requirement should be seen as expressing the requirement that aliens must contribute to the Dutch economy in order to pass the restrictive migration rules.[141]

5.2.2.6 Sanctions and losing the status of trusted referent

Infringement of the rules contained in the AEA can lead to fines, an administrative decision to suspend the activities, criminal charges in cases of repetitive infringements and civil law sanctions.[142] Infringing the central obligation contained in Ar-

134 Article 9, par 1(b) AEA. Note that labour conditions do not have to be better than the Dutch legal minimum as provided in the Arbeidsomstandighedenwet (Labour Conditions Act), see: *Kamerstukken II*, 1993/94, 23 574, Nr 3, p 18.

135 The normal Dutch rules concerning safety, hygiene and suitable housing apply, however, for a short-term even a tent may be considered a suitable solution, see: Dutch Parliament, *Kamerstukken II*, 2009/10, 17 050, Nr 393.

136 Kamerstukken II, 1993/94, 23 574, Nr 3, p 17; Effectuating Rules REAEA, par 11. Franssen 2013, p 133-143, referring to Rechtbank Den Haag 7 May 1996 ECLI:NL:RBSGR:1996:ZA2663. Practically this obligation entails advertisements in (local) newspapers as well as referring the job position to the European recruitment system Eures, see: <https://ec.europa.eu/eures/>, (last visited 1 October 2015).

137 Article 6, par 1 and 2 AEA; Article 9, par 1(a) AEA; Drongelen, van, Bogaard, van den and Rijs, van 2005, p 41.

138 This chapter, par 5.2.2.2.

139 Refusal on this ground relates to prostitution and exploitation, Franssen 2013, p 120 referring to: Dutch Parliament, *Kamerstukken II*, 1993/94, 23 574, Nr 5, p 4.

140 Article 8, par 1(d) AEA, see also: Effectuating Rules REAEA, par 14.

141 Drongelen, van, Bogaard, van den and Rijs, van 2005, p 41-42.

142 See for a brief discussion: Franssen 2013, p 189-190.

ticle 2(1) AEA, the work permit obligation, may lead to an administrative fine on the basis of the Implementation Guidelines Fines AEA 2010.[143] The height of the administrative fine is 12.000 euro for legal persons and 6.000 euro for natural persons,[144] however, the Implementation Guidelines provide for several possibilities to modify the height of this fine, depending on the described circumstances.[145] For instance, demonstrating that a reasonable effort was made to prevent an infringement of the work permit obligation may lead to a halving of the fine.[146] The line between service provision and labour under international law is difficult to draw. The Dutch AEA broadly indicates that allowing someone to perform labour leads to the qualification employer, which results in a work permit obligation. As providing labour without a permit will lead to fines this can have serious consequences. The interviews held with personnel of multinational companies relying on international mobility reveal concerns regarding the sanctions introduced in relation to sponsorship. These employers are more than willing to comply, but this may sometimes be difficult due to uncertainty. The main concern therefore is losing the privileged position due to mistakes.[147] For instance chain responsibility for sub-contractors makes it uncertain whether employers actually are in compliance with the AEA.[148] Another problem is that if the employee stops working, the sponsor is still responsible. Though first offences will be dealt with on the basis of a warning, this does not change the problem itself, sanctions based on breaches of a complex system. An intrinsically linked problem is the fact that economic actors may avoid possible fines altogether, for instance by not relying on third-country nationals where such legally would be unproblematic. Finally, with the introduction of sponsorship, this may lead companies to lose their position as a trusted sponsor when they breach these rules.

143 Regeling van de Minister van Sociale Zaken en Werkgelegenheid of 8 February 2010 tot Vaststelling van de Beleidsregels boeteoplegging Wet arbeid vreemdelingen AI/AMF/MO/10/1335 (Implementation Guidelines Fines Aliens Employment Act 2010). See concerning the introduction of administrative fines in relation to the AEA: Franssen 2013, p 158-159; Klap and de Lange 2008, par 1 and par 2.3; Tjebbes 2008.

144 Article 2 Implementation Guidelines Fines AEA 2010.

145 Administrative fines may also be imposed if employers do not check the identity of an employee provided by another employer, which relates to preventing illegal employement, see Article 15(2) in conjunction with Article 18 AEA. The General Administrative Law Act (Algemene wet bestuursrecht) provides inspection personnel with certain powers in title 5.2. On the basis of Article 5:20 everyone is obliged to cooperate with these inspectors. Within the scope of the AEA, failing to do so may lead to a fine on the basis of Article 18 AEA.

146 Article 10 Implementation Guidelines Fines AEA 2010.

147 Interview Philips (2 December 2010), interview CapGemini NL (3 December 2010) and interview PriceWaterhouseCoopers (7 December 2010), see also Kroes 2010.

148 Interview PriceWaterhouseCoopers (7 December 2010).

5.3 The Dutch GATS Mode 4 commitments and implementation

This paragraph will describe the scope of the Dutch commitments and the manner in which these are implemented. The commitments are transposed in the form of a work permit obligation, the conditions of which correspond with the limitations applying to the GATS commitments. As indicated, the conditions under which entry, residence and labour are allowed apply in general. As such, the entire legal regime described above applies, with the exception of the priority enjoying labour test. The Annex on Movement of Natural Persons provides which categories of natural persons are included under Mode 4. Natural persons supplying services are: 'service suppliers of a Member' or 'natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service'. These basic categories are further specified in the EU horizontal Mode 4 commitment.[149] The first category consists of those that have obtained a service contract in another WTO Member state, usually referred to as independent professionals. A defining characteristic of this category is that self-employed service providers receive remuneration directly from customers.[150] A different defining characteristic for self-employment is used under EU law; those in a relationship of subordination are employees, whereas those providing economic activities without being controlled by another are self-employed.[151] Nevertheless, the underlying idea is similar, the economic relationship the service provider has with the receiver, evidence of which is found in the contract relationship under the GATS and in the authority over the service provision under EU law. The second category consists of those employed by a service supplier. These are referred to as contractual service suppliers. As noted by Bast, it is not the employee who supplies the service; rather, it is the employer who supplies services through the use of employees by sending them to the territory of the WTO Member State of the receiver.[152] EU case law reveals the same important legal construction; the freedom to provide services entails the right of businesses to provide services in another Member State by sending their labour force to the Member State of the receiver. Thus, movement rights

149 The scope of GATS Mode 4 and the Annex MNP are discussed in general in chapter 2, par 2.4; World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, horizontal Mode 4 commitment, available online: <www.wto.org>.

150 GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, par 1; J Bast 'Annex on Movement of Natural Persons Supplying Services Under the Agreement' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 579, referring to: WTO Council for Trade in Services, Presence of Natural Persons (Mode 4), Background Note by the Secretariat, 8 December 1998, S/C/W/75, par 55.

151 See: case C-107/94 case C-107/94 *P.A. Asscher v Staatssecretaris van Financiën* ECLI:EU:C:1996:251, par 25 and 26; case C-268/99 *Aldona Malgorzata Jany and others v Staatssecretaris van Justitie* ECLI:EU:C:2001:616, par 34; chapter 3, par 3.3.1.1.

152 Bast 2008b, p 580-581.

for employees are derived from the right of the service supplier.[153] Mode 3 service provision, supplying services through commercial presence, presupposes Mode 4 commitments, as it is hard to establish and operate a commercial presence if managers, directors or other key personnel are not allowed to travel to the territory of the WTO Member where the commercial presence is established. Business visitors, intra-corporate transferees and key personnel are included in the EU Mode 4 commitments.[154]

The EU has concluded several Free Trade Agreements, of which the CARIFORUM FTA will serve as an example.[155] In relation to services trade, these FTAs contain so-called GATS plus obligations. The FTA commitments are similar to the GATS Mode 4 commitments but contain additional Mode 4 categories and increased liberalization for these categories. This research does not address FTAs, however, the Dutch legislation relies on the same paragraphs to implement both types of commitments. The additional Mode 4 category trainees is implemented in a paragraph that only applies to the FTAs.[156] Trainees and independent professionals are part of the EU's revised offer[157] which means that if the Doha Round is concluded, these new commitments can be easily implemented.

5.3.1 Implementation of the GATS commitments

The implementation of the Dutch GATS Mode 4 commitments can be found in the AEA regime in the Effectuating Rules Regulation Effectuating Aliens Employment Act (Effectuating Rules REAEA) which constitute policy guidance. In relation to EU law, the ECJ has clearly indicated that policy guidance does not count as an appropriate legal instrument to implement Union law, in particular due to the principle of legal certainty.[158] The GATS commitments have led to an exception to the general AEA rules for those falling within the scope of the GATS Mode 4 commitments. The change derived from the GATS to the general AEA regime is

153 Chapter 3, par 3.4.2.

154 GATS Annex on Movement of Natural Persons Supplying Services under the Agreement (Annex MNP), Artice 2, see also GATS Article 1(2).

155 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part OJ (2008) L289/I/3. The Dutch implementation legislation does refer to the EU's FTAs with South Korea, Peru and Columbia and Central American states (Costa Rica, El Salvador, Guatemala, Hondural, Nicaragua and Panama), however the implementation of these FTAs does not cover the comparable GATS Mode 4 category of Contractual Service Suppliers, see Effectuating Rules REAEA par 50 and Annex III. As the CARIFORUM FTA does include all GATS Mode 4 categories, it serves as the example. A comprehensive study of these FTAs is beyond the scope of this research.

156 Effectuating Rules REAEA, par 50-53.

157 WTO Council for Trade in Services, Communication from the European Communities and its Member States Conditional Revised Offer, 29 June 2005, TN/S/O/EEC/Rev.1, horizontal Mode 4 commitment, discussed in this chapter, par 5.3.5.

158 Case C-441/02 *Commission v Germany* ECLI:EU:C:2006:253; K Groenendijk and H Oosterom-Staples 'Nieuwe Vreemdelingencirculaire: Associatierecht voor Turkse Burgers Gebrekkig Weergegeven' (2014) 1 *Asiel en Migrantenrecht*, p 6-7.

limited to the abolition of the priority enjoying labour test. This condition does not apply when a business posts its employees in the Netherlands to provide a service, if that specific service falls within the scope of the GATS and the appropriate Dutch Mode 4 commitments. The removal of the requirement to utilise priority-enjoying labour is significant, as this forms a serious impediment on the notion of a level playing field in relation to service provision. Clearly, the removal of this test is only the beginning towards this level playing field. Moreover, the GATS regime applies under several severely restrictive conditions, in relation to a limited number of service sectors.

5.3.2 Contractual service suppliers

The GATS Mode 4 category Contractual Service Suppliers (hereinafter CSS) is defined in the EU horizontal commitment as:

> The natural persons are engaged in the supply of a service on a temporary basis as employees of a juridical person, who has no commercial presence in any Member State of the European [Union].
>
> The juridical person has obtained a service contract, for a period not exceeding 3 months from a final consumer in the Member State concerned, through an open tendering procedure or any other procedure which guarantees the bona fide character of the contract (e.g. advertisement of the availability of the contract) where this requirement exists or is introduced in the Member State pursuant to the laws, regulations and requirements of the European [Union] or its Member States.[159]

As such, this category relates to the EU concept of posted workers.[160] Posting employees to perform a service contract must comply with the following conditions:[161]

- The natural persons are engaged in the supply of a service on a temporary basis as employees of a juridical person, who has no commercial presence in any Member State of the EEA or in Switzerland;
- The juridical person has obtained a service contract, for a period not exceeding 3 months from a final consumer in the Member State concerned, through an open tendering procedure or any other procedure which guarantees the *bona fide* character of the contract (e.g. advertisement of the availability of the

159 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment.
160 Chapter 3, par 3.4.2.
161 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment; Effectuating Rules REAEA par 51

contract) pursuant to the laws, regulations and requirements of the European Union or the Netherlands;
- The posted workers are part of the regular staff of the service provider and have been employed over a year in relation to the services to be provided;
- Residence in the Netherlands is limited to the duration of the service contract, with a maximum of three months within a two-year period;[162]
- Posted employees may only provide labour in relation to the service to be provided, as indicated on the work permit, it does not confer entitlement to exercise the professional title in the Netherlands and the number of posted employees may not exceed that which is reasonably required in order to provide the service;
- Posted workers require a university degree, three years of relevant work experience and should comply with relevant Dutch requirements relating to the profession concerned.[163]

The GATS commitment relating to the posting of workers is limited to the following service sectors: accountancy, taxation advisory services, architectural services, engineering services, integrated engineering services, urban planning and landscape architectural services, computer and related services, construction services.[164] The rules that implemented the GATS commitments until the first of January 2014 explained this limitation and listed these sectors.[165] However, the Effectuating Rules REAEA have replaced the old implementation, but do not contain a list of these service sectors which makes it harder to understand these rules. The limitation to the duration of the service contract in the GATS commitment is more strict, as the horizontal commitment indicates a limitation of three months within a two-year period.[166] The limitation of service provision to three months and the condition that the same employee may not reside in the Netherlands for more than three months in a two-year period clearly limit competition opportunities.[167] The Dutch implementation is therefore more liberal.

162 This 24 month cool down period only applies for the Netherlands, all other EU Member States impose a maximum of 3 months in a 12 month period.

163 Note that posted nationals of the CARIFORUM do not require a university degree as they are posted only as photo models, chefs de cuisine or in the cultural service sector (not radio or television), however, they do require other relevant educational degrees. Moreover, posting under the CARIFORUM rules does not require fulfilment of the procurement rules, Effectuating Rules REAEA, par 50.

164 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment.

165 RoA, Article 8(18)(b).

166 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment.

167 Note that only the Netherlands applies a three months residence period within two years, all other EU Member States require one year only: WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment.

5.3.3 Intra-corporate transfers

The Mode 4 commitment relating to intra-corporate transfers is implemented as a sub-category of a category referred to as 'key personnel' which includes both business visitors (which will be discussed in the next paragraph) and intra-corporate transfers.[168] From the outset, it should be made clear that this is not in conformity with the categories in the actual commitment. ICT and BV are two separate categories. The commitment contains two categories of BV, which relate to the purpose of the business visit: 'service sellers' and 'establishment of commercial presence'.[169] Indeed the commitment relating to business visitors of the last of these two categories does contain a reference to the ICT commitment. The idea is that those visiting for the purpose of establishing a commercial presence must be persons that fit the definition of ICT. However, this is not the case for the first category of business visitors, those visiting for the purpose of selling services. The Dutch implementation includes both Mode 4 categories, ICT and BV into one main category 'key personnel'. While providing a heading in itself is not problematic, the result is that implementation mistakes were made. Moreover, adding an extra heading when implementing these commitments is extremely confusing as the GATS Mode 4 commitment itself is already hard to understand. Aggravating this is the fact that the name 'key personnel' in itself is badly chosen as that term may be confused with the 'specialist' sub-category of ICT. The ICT specialist category relates to persons who possess uncommon knowledge essential to the provision of the service. It would not be strange to consider such persons to be 'key personnel'.[170]

The Dutch implementation defines ICT as managers and specialists who are temporarily transferred to an establishment (office, branch or subsidiary) on the Dutch territory. The transferee must be employed by, or be a partner in the company (not being a majority shareholder) for at least one year prior to the transfer.[171] The person may reside in the Netherlands for a maximum of three years.[172] The actual GATS commitment is slightly different, as the definition of intra-corporate transfers contains the phrase: 'being temporarily transferred in the context of the provision of a service through commercial presence in the territory of a [Union] Member State', and 'the transfer must be to an establishment (office, branch or subsidiary) of that juridical person, effectively providing like services in the territo-

168 Effectuating Rules REAEA, par 52.

169 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment, i(a) and (b) and ii(a) and (b).

170 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment, i(b).

171 Note that partners under the CARIFORUM regime may be majority shareholders, Effectuating Rules REAEA, par 50.

172 Effectuating Rules REAEA, par 51, this more or less implements WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment, footnote 7. The one year employment or partner condition is contained in the main text of the horizontal commitment at i. Note that the double reference to the person being a manager or specialist is not a mistake made by the author.

ry of a Member State to which the EEC Treaty applies'. As such, the Dutch implementation lacks any reference to the provision of service, which is the main purpose of the GATS commitment. The definitions of the sub-category categories of ICT, managers and specialist, are in conformity with the GATS commitments as they constitute exact translations. Manager is defined in Dutch law as:

> persons working in a senior position within a juridical person, who primarily direct the management of the establishment, receiving general supervision or direction principally from the board of directors or stockholders of the business or their equivalent, including:
> a. directing the establishment or a department or sub-division of the establishment;
> b. supervising and controlling the work of other supervisory, professional or managerial employees;
> c. having the authority personally to hire and fire or recommend hiring, firing or other personnel actions.[173]

The second category of ICT, specialist is referred to as:

> persons working with a legal person who possess uncommon knowledge essential to the establishment's service, research equipment, techniques or management. In assessing such knowledge, account will be taken not only of knowledge specific to the establishment, but also of whether the person has a high level of qualification referring to a type of work or trade requiring specific technical knowledge, including membership of an accredited profession.[174]

5.3.4 Business visitors

As explained in the previous paragraph, the GATS Mode 4 commitment includes two types of BV, service sellers and those setting up a commercial presence. The Dutch implementation of this category include business visitors, similarly to ICT under one heading 'key personnel'. BV setting up a commercial presence are correctly implemented. Temporary stay is granted to persons working for a legal person of a WTO Member State which is not a non-profit organization, who are responsible for the setting up of an establishment of that company. The same applies for those who are responsible to oversee the administration and exploita-

173 Effectuating Rules REAEA, par 52, which compares to the horizontal GATS mode 4 commitment i(a).
174 Effectuating Rules REAEA, par 52, which compares to the horizontal GATS mode 4 commitment i(b).

tion of such an establishment.[175] BV need to have a management position, they may not be engaged in making direct sales to the general public and may not receiver remuneration from a source based on the territory of the host.[176] The maximum duration of residence for BV is 90 days in a 12 months period.

Strikingly, the other category of BV contained in the GATS Mode 4 commitment is completely missing. The commitment provides entry and stay in relation to:

> ii) the temporary presence of natural persons in the following categories:
>
> a) Persons not residing in the territory of a Member State to which the EC treaties apply, who are representatives of a service supplier and are seeking temporary entry for the purpose of negotiating for the sale of services or entering into agreements to sell services for that service provider, where those representatives will not be engaged in making direct sales to the general public or in supplying services themselves.

It may be possible that such persons can perform their negotiating activities on other entry grounds, yet that does not constitute implementation. It certainly would be extremely intransparent. This clearly was an implementation mistake which most likely relates to the attempt to consolidate the GATS Mode 4 commitments of ICT and BV. Indeed business visitors setting up a commercial presence must also fit the definition of ICT. Yet this is not the case for service sellers. When this implementation error is corrected, the Dutch legislator should pay attention to the fact that service sellers may not be limited to persons also fitting the ICT definition, as that is not included in the GATS commitment itself.

5.3.5 The Mode 4 commitments offered in the Doha Round negotiations

This paragraph provides an overview of the possible outcome of the Doha Round negotiations for Mode 4 liberalization. The EU has offered to open its services market for trainees and independent professionals in the revised offer made during the Doha Round negotiations.[177] The CARIFORUM commitments already includes the trainee category. The implementation of the CARIFORUM commitment therefore provides a strong indication of the manner in which this category will be implemented in relation to the GATS after completion of the round. Additionally, the offer includes changes relating to the contractual service suppliers category, which in-

175 Effectuating Rules REAEA, par 52, this implements the horizontal GATS mode 4 commitment ii under b. Legal persons under the CARIFORUM regime may be non-profit organizations, Effectuating Rules REAEA, par 50.

176 The GATS commitment does not mention the receiving of remuneration limitation, however, this presumably can be considered covered under the limitation relating to engaging in direct selling to the public.

177 WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.

clude limited additional access and changes to the imposed conditions. The EU revised offer relating to the independent professional category will be described as well; however, there is no national legislation to compare this offer with.

Trainees

Dutch legislation defines trainees as university graduate employees who are transferring for career development purposes or to obtain training in business techniques or methods to an establishment in the Netherlands. Trainees need to be employed at least one year and may stay for a maximum of three years in the Netherlands. The recipient company in the EC may be required to submit a training programme covering the duration of the stay for prior approval, demonstrating that the purpose of the stay is for training at the level of a university graduate.[178] The GATS offer is similar, with the exception of the allowed maximum duration of stay, which is limited to one year.[179]

Contractual service suppliers

The offer provides the following additional commitments and definitional changes. The maximum duration of residence is extended from three to 12 months. As to the procedural requirements, the revised offer includes an extra footnote which indicates that the 'competent authorities in the Member State must be able to establish that the contract has been awarded to that juridical person in accordance with the requirements set out in the procedure in question'.[180] The existing commitment already indicates that the procedures and rules relating to obtaining a service contract apply; this addition does not seem to add substantive requirements. Nevertheless, such changes must be observed closely as adding requirements is contrary to the concept of progressive liberalization.[181]

Additional service sectors to which this commitment applies are included in the offer. To provide contrast with the sectors already included, the new sectors are signified in italic:

> *Legal services*, accounting and *bookkeeping services*, taxation advisory services, architectural services, urban planning and landscape architectural services, engineering services, integrated engineering services, computer and

178 Effectuating Rules REAEA, par 53.
179 WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment under i.
180 WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.
181 Note that the language relating to required qualifications and work experience seems to have changed, but this is not the case, as the condition of three year relevant work experience is included in all relevant vertical commitments. As such, the revised offer, which contains this condition in the horizontal commitment, provides more clarity.

> related services, *advertising, management consulting services, services related to management consulting, technical testing and analysis services, related scientific and technical consulting services, maintenance and repair of equipment, translation services*, construction services,[182] *site investigation work, environmental services*.[183]

While this indeed is a significant addition in comparison to the Uruguay Round commitments, the offer mostly adds service sectors in relation to highly-skilled service providers. The EU offer specifically indicates the following limitation:

> Commitments are subject to the application of a numerical ceiling [modalities of application to be determined], except where otherwise indicated for a specific sub-sector. Commitments are not subject to the application of a numerical ceiling in the case of DK, I, NL, S, UK (other than for computer and related services in the case of the UK).[184]

As such, on the basis of the offer this limitation in the form of a quota may not be imposed by the Netherlands, in contrast with most other Member States.

Independent professionals

Independent professionals are natural persons who have obtained a service contract in another WTO Member state. As such, independent professionals receive remuneration directly from consumers. The EU offer provides the following definitions and limitations:[185]

- The natural person is engaged in the supply of a service as a self-employed person established in the territory of a WTO Member other than that of a Member State of the European [Union];
- The natural person has obtained a service contract other than through an agency as defined by CPC 872 (providing labour services) for a period not exceeding 12 months from a final consumer in the Member State concerned, through a procedure which guarantees the bona fide charac-

182 The UK was, and remains unbound in relation to construction services.

183 The Netherlands and the UK have not added the sector research and development services, the sector higher education services, the sector entertainment services and the sector services related to the sale of equipment or to the assignment of a patent which was added to the offer by two of the EU-15 Member States. Moreover, the UK and remain unbound in the travel agencies and tour operator services, which was added by 8 of the EU-15 Member States. EU-15 refers to the 15 old Member States before the 2004 enlargement round.

184 The brackets are provided in the original tekst and therefore do not constitute added language. WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.

185 All references to the Member States, and all language relating to other Members States than the Netherlands were removed.

ter of the contract where this requirement exists or is introduced in the Member State pursuant to the laws, regulations and requirements of the European [Union] or its Member States;
- The service contract shall comply with the laws, regulations and requirements of the European [Union] and the Member State where the contract is executed.
- The natural person must possess (a) a university degree which is relevant to the sector of activity concerned or a technical qualification demonstrating knowledge of an equivalent level, (b) professional qualifications where this is required to exercise an activity pursuant to the laws, regulations or requirements of the EC or the Member State where the service is supplied and (c) at least six years professional experience in the sector.
- The commitment relates only to the service activity which is the subject of the contract; it does not confer entitlement to exercise the professional title of the Member State concerned.

Access is offered only in relation to the following service sectors: legal services, architectural services, urban planning and landscape architecture, engineering and integrated engineering services, computer and related services, management consulting services and services related to management consulting and translation services. As is the case with the contractual service supplier offer, the offered commitment in relation to independent professionals provides a quota limitation, but not in the case of the Dutch commitments.

> Commitments are subject to the application of a numerical ceiling [modalities of application and level to be determined], except where otherwise indicated for a specific sub-sector. Commitments are not subject to the application of a numerical ceiling in the case of DK, NL, S, UK (other than for computer and related services in the case of the UK).[186]

A final condition reads:

> The temporary entry and stay within the Member State concerned shall be for a cumulative period of not more than six months in any 12 months period or for the duration of the contract, whatever is less.

186 The brackets are provided in the original tekst and therefore do not constitute added language. WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.

As is apparent from these conditions, the liberalization offered is again limited to services requiring a high skill level of the provider. A severe limitation is the requirement of six years of professional experience.

5.3.6 Analysis Dutch implementation GATS Mode 4 commitments

Several aspects of the Dutch legislation applying to GATS Mode 4 service providers require an indepth analysis, with inclusion of the exemptions provided under the GATS. Some of these aspects, such as sponsorship, are also part of UK legislation. Consequently, this in-depth analysis is a matter to be left to the concluding chapter of this research.[187] This paragraph will provide an initial analysis of the Dutch implementation of GATS Mode 4 commitments, limited to matters that are less complicated.

As a starting point, the heading 'key personnel' as an overarching category for ICT and BV is not necessary and confusing. The implementation should incorporate the main division provided in the commitments into intra-corporate transferees, business visitors and contractual service suppliers. Moreover, the Dutch implementation of its Mode 4 commiments is incomplete on two accounts. The business visitor sub-category of service sellers is simply not included. This should be remedied, and it is important that this category will not be limited to persons that fall within the definition of manager and key personnel. The GATS Mode 4 commitment simply refers to 'representatives of service suppliers'.[188] It is advisable to use the same terminology as used in the GATS commitments. Business visitors is the term used for those setting up commercial presence, as well as those selling services and negotiating services agreements. Second, the implementation of the intra-corporate transferee definition deviates from the GATS commitment as all reference to the provision of services is missing.

Less dramatic is the odd reference contained in the business visitors category to the exclusion of non-profit organizations. This exclusion is part of the GATS commitments, but it applies in general to intra-corporate transferees, and not just to business visitors.[189] This may be the result of the fact that the term intra-corporate transferee under the GATS commitment applies to the identified positions (managers and key personnel) and not to the activities (setting up an establishment and sales negotiations). In any case, the end result is adding confusion to an already confusing topic.

187 Chapter 7, par 7.5.3.

188 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment ii under a. It is crystal clear that this category is not limited to managers and specialists, as this limitation is explicit in relation to business visitors, see the commitment ii under b.

189 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment, footnote 7.

5.3.7 Conclusions GATS Mode 4

Some of the national provisions are clearly in contrast with the GATS obligations; however, this clarity is the exception. In addition to the described issues relating to implementation, the GATS requirement of an information contact point for developing WTO Members seems to be ignored. As a developed WTO member the Netherlands is obliged to do so. The obligatory nature is evident from the fact that non-developed WTO Members must create such information points *to the extent possible*.[190] Consequently, the GATS implies that this obligation should be unproblematic for the Netherlands. The Dutch government does not provide English versions of laws, though these may on occasion be available through the Ministry of Foreign Affairs. As such, the information requests made by other Members are of significant importance. The enquiry points are often formed by a single person within the trade or economy ministry and these are rarely updated.[191] This seems to be the case with the Dutch enquiry point which simply lists outdated contact information of one individual working at the Ministry of Economic Affairs.[192]

More difficult is the assessment of the implementation of GATS Mode 4 obligations as a whole. Some of the obligations described above may or may not expressly run counter to GATS obligations, but they may infringe the underlying rationale of the GATS. A case can be made that the manner of implementation in its entirety is contrary to the aim of the GATS. It is not before the Policy Guidance level of legislation that it becomes apparent that GATS Mode 4 service providers even require a work permit. The use of policy guidance in itself to implement international obligations is dubious from a legal certainty perspective. Additionally, the broad definition of employer contained within the AEA means that service providers fall within its scope. Implementing service mobility in a regime that deals with access to the labour market by foreigners leads to odd situations such as a one time service receiver becoming the sponsor, including all administrative obligations that entails, of the service provider. As a whole, instead of facilitating

190 Article IV:2 GATS.

191 International Centre for Trade and Sustainable Development 'Cross-border trade in services: Barriers and opportunities in EU services markets for ACP exporter' (2010) 9:9 *Trade Negotiations Insights* available online: <http://ictsd.org/i/competitiveness/94184/> (last visited 1 October 2015); OECD Trade Directorate Trade Committee, Working Party of the Trade Committee *Strengthening Regulatory Transparency: Insights for the GATS from the Regulatory Reform Country Reviews* (1999) 43 Working Paper TD/TC/final, p 26-28.

192 Performing an internet search results in the following, clearly outdated document: <www.wto.org/english/tratop_e/serv_e/contacts_e.doc> (last visited 1 October 2015). The document provides a web address for the EU enquiry point as well, but that link no longer works. One other search results links to an EU list which lists the same outdated information: <http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147721.pdf> (last visited 1 October 2015). The Dutch Government website contains no reference to the inquiry point: <http://www.rijksoverheid.nl/> (last visited 1 October 2015). See also: P Delimatsis 'Article III GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 103; WTO Working Party on Domestic Regulation, Report on the Meeting Held on 24 September 2004, 15 November 2004, S/WPDR/M/27, par 16 and 21.

GATS service suppliers, the national rules turn an already complicated topic into a legal complexity that is difficult to comprehend, let alone utilize in practice.

Problems in respect of sponsorship

The main problem with the introduction of sponsorship is that it may violate a standstill obligation in relation to the adopted commitments. It may also constitute an impairment of GATS obligations. It may also be problematic from a transparency perspective as duties relating to sponsorship are not sufficiently clear. Additionally, a review of the sponsorship rules and underlying arguments that have led to their introduction may lead to the conclusion that sponsorship ill fits GATS Mode 4 movements. The fact that sponsorship applies to GATS Mode 4 is far from clear. The residence permit and the accompanying sponsorship obligation is linked to the work permit obligation in cases of labour provided by third-country nationals. While this construction is not remarkable from the perspective of intra-corporate transfers, applying this regime to contractual service suppliers (posted employees) is odd. Yet, the receiver of such services is allowing a foreigner to provide labour on the Dutch territory, and therefore falls within the definition of employer. The consequence is that for this last category the sponsor will be the service receiver. The procedure for recognized sponsorship is burdensome and costly for smaller companies, let alone natural persons.[193] It is not certain how the category of independent professionals will be implemented, but it is apparent that this category is even less suitable for implementation in the same regime. It would be more logical to include GATS Mode 4 in the regime applying to third-country national self-employed persons. This is also apparent from the fact that self-employed service providers do not need a sponsor as the government itself indicates that there is no apparent person who has an interest in the migrant's residence in the Netherlands.[194]

As discussed in the introductory paragraph to this chapter, this leaves the important issues formed by the additional requirements imposed by Dutch migration law since the adoption of the GATS Uruguay Round commitments, and the blanket reference contained in the GATS Mode 4 commitments.[195] This requires an analysis of the interaction between the added obligations, exemplary of which is the sponsorship obligation and several GATS obligations and exemptions. As these matters are problematic for the implementation of UK GATS Mode 4 commitments, the conclusion will provide the final analysis of this matter.[196]

193 Groen *et al* 2013a, p 192.
194 Reurs 2014, p 66; Dutch Parliament, *Kamerstukken II*, 2008/09, 32 052, Nr 3, p 80-81.
195 Chapter 2, par 2.4.1.
196 Chapter 7, par 7.5.3.

5.4 Implementation of EU obligations in Dutch law and practice

This paragraph will first describe the rules for entry, residence and the right to provide services of EEA nationals. Next, the specific transitory regime applying to Croatian nationals will be addressed, as well as the rules applying to posted workers of EU service suppliers. Finally, the position of Turkish nationals will be described.[197]

5.4.1 Introduction

The obligations derived from primary and secondary Union law are embedded in a well-established legal system which tries to ensure the implementation and effectuating of these norms in the national legal orders of the Member States.[198] This system provides the ground rules that need to be observed by the national judiciary and administration when they are confronted with Union law obligations.[199] Implementation and application of Union law is a shared responsibility between the EU institutions and the Member States. This entails that national law is often used to effectuate Union law. Where effectuating is left to the Member States, they are relatively free to organize this in accordance with their own legal order unless Union law explicitly provides otherwise. Yet, these principles of institutional and procedural autonomy are limited by ground rules that ensure the full application of Union law. These ground rules therefore form important obligations that need to be observed by the national judiciary as well as the administration.[200] As a consequence of direct effect, Member States and their organs, including administrative authorities, are under the obligation to apply directly applicable Union law on their own accord. The fact that Union law requires all state organs to autonomously ensure that national law is in conformity with Union law greatly facilitates the implementation and effectuating of Union law.[201] The most important Dutch administrative organs dealing with the administration of the rules addressing foreign

197 Turkish nationals are in a preferred position due to the EEC – Turkey Association Agreement and two subsequent decisions of the Association Council; Agreement establishing an Association between the European Economic Community and Turkey, Ankara 12 September 1963 OJ (1964) 3687/64; Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association; Decision No 2/76 of the Association Council of 20 December 1976 on the implementation of Article 12 of the Ankara Agreement. These decisions have initially led to case law recognizing free movement of worker rights after which certain rights for service providers were identified in ECJ case law as well.

198 Chapter 3, par 3.6. A thorough description with particular emphasis of the consequences for the Dutch legal order of this system can be found in: JH Jans, S Prechal and RJGM Widdershoven, *Inleiding tot het Europees bestuursrecht* (Ars Aequi Libri, Nijmegen 2011).

199 Chapter 3, par 3.7.

200 Chapter 3, par 3.7. See also B Hessel, E Perton and M Schiebroek *De Dienstenrichtlijn Decentraal, de Gevolgen van de Dienstenrichtlijn voor Decentrale Overheden* (Sdu Uitgevers, The Hague 2009), p 49-50.

201 Chapter 3, par 3.6. See for an example of a national case referring to this obligation: Vz ABRvS 11 September 1997 (*Vughts deelnemingen*) Milieu en Recht 1998 nr 72.

service suppliers are the Immigratie- en Naturalisatiedienst (IND) and the Uitvoeringsinstituut Werknemersverzekeringen. As organs of the Dutch State, the IND and the UWV have to apply directly applicable Union law when they take decisions regarding admission, residence and work permits.

5.4.2 EU citizens, EEA nationals and family members

For EU citizens the right to reside in the Netherlands is not based on the Dutch rules. Instead, all nationals of the EU derive these rights directly from, and under the conditions of, EU law. Consequently the AA does not require a residence permit for EU citizens.[202] Emphasizing the fact that these nationals enjoy entry and residence rights directly on the basis of EU law, the AA explicitly refers to the definitions provided by these international treaties. Consequently, concerning these definitions the application of EU law is ensured and changes to these definitions in the EU legal order are automatically part of Dutch law.[203] Consequently, the regime relating to residence permits is not applicable.[204] For the purposes of free movement, and service provision in specific, EEA nationals are in a similar position as EU nationals. The rights of Swiss nationals (part of the European Free Trade Association, but not of the EEA) are limited to providing services for a period of 90 days per calendar year. As long as the EU defined category of family members and members of the household of EU citizens accompany the EU, EEA or Swiss citizen from whom they derive their rights, they too enjoy the same set of residence rights as EU nationals.[205] The AA indeed provides a single regime for all these nationals by defining 'community' citizens as EU, EEA and Swiss nationals and their family members.[206] It seems odd that a referral to the EC – Swiss Confederation Agreement is not part of this provision in the AA.[207] Within Dutch law Swiss nationals are simply referred to as EEA nationals.[208] To simplify matters, hereinafter this paragraph will refer to EU citizens and EU law only, without explicitly referring to EEA, Swiss nationals or family members, nor to the EEA or the Swiss Confederation Agreement, unless there is an explicit reason to do otherwise. The conditions applying to entry of an EU national differ significantly from the above described general entry regime. EU citizens in possession of a valid border

202 Article 8(e) AA.
203 Article 1(e) AA; Lodder 2011, p 31. Thus these implementing Acts avail themselves of dynamic implementation methods, changes to the EU definitions, including in case law, automatically are part of the definitions provided in the national legal order. See for a discussion of this implementation method Jans, Prechal and Widdershoven 2011, p 14.
204 Article 8(e) AA.
205 Chapter 3, par 3.4.1.
206 Article 1(e) AA; The term community citizens was used within the European legal order in the pre-Lissabon era, the AA still refers to 'gemeenschapsonderdanen', which translates to community citizens.
207 Article 8(e) AA.
208 Article 1 AA.

crossing document can only be refused entry to the Dutch territory on grounds of the public order, public security or public health.[209] In accordance with EU law, the border crossing document is only required to verify the nationality of the alien wishing entry.[210] Moreover, the refusal grounds are based on the derogations provided in the Citizens Rights Directive. These should be distinguished from the refusal grounds contained in the general regime of the AA.[211]

The internal market entails that the work permit regime as provided in the AEA is not applicable to EU citizens. The AEA provides that a work permit is not required for those exempted on the basis of an international treaty or a decision by an international organization, which includes EU citizens.[212] In fact, the opposite of the work permit obligation holds true, as the Dutch labour market is part of the internal market. EU citizens are considered as priority enjoying labour, receiving priority over those who fall within the general AEA regime.[213]

5.4.3 Posted workers, derived mobility rights from EU service providers

EU law requires equality of competition between EU service providers and domestic service providers. This equality extends to the personnel of service providers, which entails that an EU service provider is allowed to post its own personnel in the host state in order to provide the service. As such, employees of service providers should be provided entry to, and reside on, the territory of the host Member State. If the service provider is an EU national, this should be unproblematic, as the employee enjoys movement rights directly. Problems arise in relation to non-EU national and transition citizen posted workers. The Member States have shown reluctance to accept the premise that the movement of third-country national employees is an inherent part of the service provision itself, without which competition with national service suppliers will be distorted. The main idea is that the posted worker is legally employed in the home state. Consequently, the other Member States simply have to trust the home state and accept that the posted worker is legally employed and will return to that state after the service is provided. This trust does not come easy. As explained in the EU chapter, various Commission infringement procedures demonstrate this lack of trust and the will of Mem-

209 Article 8.7 AD lists the identified categories of nationals (EU, EEA and Swiss nationals) and their family members as contained in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ (2004) L158/77; chapter 3, par 3.5.3.2.

210 Article 8.8(4) AD, chapter 3, par 3.5.3.2. See also case C-378/97 *Criminal proceedings against Florus Ariël Wijsenbeek* ECLI:EU:C:1999:439, par 42, 44 and 45.

211 Chapter 3, par 3.5.3.1 and 3.5.3.2. Article 8.8(1) AD.

212 Article 3(1) sub a AEA.

213 Effectuating Rules REAEA, par 10.

ber States to perform prior control over the movement of posted workers.[214] This is no different when it comes to the Dutch legislator.

The reluctance to accept ECJ case law on the posting of workers is clear from the rules applying prior to this information obligation. Initially, posted workers required a work permit, which violated the ECJ case law concerning the posting of workers. The threat of an infringement procedure was required to change this obligation.[215] The EU right to post workers is implemented in the form of an exception to the AEA work permit obligation. In 2005, the Raad van State (Council of State) issued an advice indicating that the exception is not necessary. The AEA clearly indicates that no work permit is required if such is prohibited on the basis of a Treaty or a decision of an international organization.[216] This provision is sufficient to implement the EU rules concerning the posting of workers.[217] Instead, the AEA provides an exception to the work permit obligation under the following conditions:

- the employee is legally employed in the state where the EU service provider is established;
- the employer notifies the UWV in writing and prior to employment;
- hiring-out of personnel does not fall within this exception, consequently such service suppliers do require a work permit.[218]

As is apparent from the *Essent* case, the work permit condition relating to third-country nationals hired-out to Dutch companies must be removed.[219] Providing services in the form of hiring-out legally employed personnel falls within the scope of the freedom to provide services. Such services may be restricted, but only by an objective justification which is proportional to the interest that needs protection. In the *Essent* case the Court does recognize the objective of making sure that the hiring-out of personnel is legal, and does not actually constitute true employment by a host state company. However, seeking to protect that aim with a work permit obligation is not proportional.

The AEA provides that if an exception to the work permit obligation applies, this has to be notified to the authorities in writing two days prior to the start of

214 Chapter 3, par 3.4.2.

215 Franssen 2013, p 65; Besluit van 10 november 2005 tot wijziging van het Besluit uitvoering Wet arbeid vreemdelingen en van het Vreemdelingenbesluit 2000 Stb (2005) 577. See also: Raad van State 'Year Report' (2006), p 69, available online: <https://www.raadvanstate.nl/publicaties/jaarverslagen.html>. EU-8 nationals refers to the 8 Member States of the 2004 enlargement round the nationals of which faced transitional measures suspending the freedom of movement of workers, see extensively, chapter 3, par, 3.4.2.

216 Article 3(1) AEA.

217 Raad van State, 14 October 2005, Advice W 12.05.0419/IV, Annex to Stcrt 13 December 2005, nr 242, par 1-2; ABRvS 17 March 2010 ECLI:NL:RVS:2010:BL7833 and ABRvS 19 May 2010 ECLI:NL:RVS:2010:BM4982, see also the case note to the latter judgment by T de Lange.

218 Article 1e under c DEAEA, see for a relevant Dutch case: ABRvS 2 August 2006 ECLI:NL:RVS:2006:AY5515.

219 Chapter 3, par 3.4.2.

employment. To verify whether the posting is in conformity with these conditions, information must be provided consisting of evidence off the legality of residence and employment in the Member State of establishment of the service provider. Moreover a form must be submitted, including information regarding the location where the employment will take place.[220] Alternatively, the employer may submit a statement including the following information:

- the name and address of the employer;
- the nature of business of the employer and information concerning the registration of establishment of the service provider in the home state;
- the name and address of the receiver of the service;
- the nature of the service to be delivered;
- the time and place of employment;
- the identity of the employee.

Finally, the AD provides that a temporary residence permit can be provided to third country nationals posted on the territory of the Netherlands under the conditions contained in the AEA.[221] While this provision therefore does not hold any additional obligations regarding residence, ECJ case law clearly provides that posted workers may not be obliged to obtain residence permits.

5.4.4 EU citizens facing temporary restrictions from the free movement of workers

Croatia joined the EU on the first of July 2013. The Netherlands has opted to utilize the transitional regime that restrict access to the labour market. This restriction may be upheld for five years, though review of the transitional measures is required after two years. At the end of the five year period another two years extension is possible, but only if there is a threat that lifting these restrictions would lead to serious disturbances to the labour market. In practice, the Netherlands imposes such restrictions for the full seven years, which would be July 2020 for Croatian nationals.[222] Such restrictions are imposed by the Netherlands since the enlargement round of 2004. The fact that these EU citizens enjoy the freedom to provide services, but are barred from entering labour contracts has had some ma-

220 Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ (2009) L284/1; the Dutch legislation still refers to the old E101 form and the replaced Directive 574/72/EEC. Article 2a AEA and Article 1e(2) DEAEA. See also: Effectuating Rules REAEA, par 1. See also: Grütters et al 2012, p 205.

221 Article 3.31a AD

222 Treaty between the Member States of the European Union and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union OJ (2012) L112/10, Annex V(2), par 2 'free movement of persons'; see also: Dutch Parliament, *Kamerstukken II*, 2012/13, 33 183, Nr 6.

jor (unforeseen) consequences.[223] To prevent circumvention of the AEA and the work permit obligation, the Dutch policy tries to uncover so-called 'bogus self-employment', a fictitious contract relationship between a service provider and a contractor, where the contractor should be considered the employer.[224] Such constructions can be divided into two main categories: a service provider posting transition nationals employees in another Member States whereas in reality the employees are hired-out. The other fictitious contract relationship relates relates to the Dutch business model referred to as 'zelfstandige zonder personeel' which translates to self-employed without personnel. Under the guise of being self-employed without personnel providing services for a receiver, whereas in reality that person is the transition citizens employer.

The ECJ clarified that the hiring-out of employees is a service. However, this form of service provision does have an impact on the national labour markets. As is clear from the *Vicoplus* and *Essent* judgment, this form of service provision has a different purpose than providing cross-border services, as is the case with the posting of workers.[225] Consequently, Members States have indicated the wish to protect their labour market during the transitional period applying on the basis of accession agreements, have the right to do so. This is directly related to the limitation contained in the Act of Accession aiming to prevent disturbances to the labour market. As described in the previous paragraph, the Netherlands imposes a work permit obligation to all receivers of hiring-out services.[226] In relation to transition citizens this obligation may be upheld, but as indicated, this is not the case in relation to third-country nationals. Regarding residence, the only temporary restriction of rights derived from EU law relates to the free movement of workers. Consequently, all entry and residence rights apply, and such nationals may not be confronted with residence permit obligations. Consequently, transition citizens fall within the same residence regime as EU citizens not facing these restrictions.[227]

Self-employment or employment

A true situation of self-employment involves a genuine self-employed person performing a service contract and Dutch courts often use the definition provided in

223 For data concerning the increase of self-employed Polish nationals after the accession of Poland, see: C Pool *Migratie van Polen naar Nederland in een Tijd van Versoepeling van Migratieregels (*Boom Juridische uitgevers, The Hague 2011), chapter 6, par 1.

224 Y Jorens and T van Buynder 'Self-Employment and Bogus Self-Employment in the European Construction Industry in the Netherlands' (2008) Expert Country Report, available online: <http://www.efbww.org> (last visited 1 October 2015).

225 Joined cases C-307/09 to C-309/09 *Vicoplus SC PUH and Others v Minister van Sociale Zaken en Werkgelegenheid* ECLI:EU:C:2011:64; chapter 3, par 3.4.2.

226 Article 1e under c DEAEA.

227 This chapter, par 5.4.2.

the *Jany* case as a benchmark.[228] Tjebbes notes that the background of the *Jany* case, whether a pimp and a prostitute are in an employment relationship, has influenced the ECJ decision concerning the direct and full payment as part of that payment remains in the hands of the pimp. However, this criterion is less relevant concerning other employment relationships.[229] To verify that the service provider is genuinely self-employed, those wishing to use their services (employers within the meaning of the AEA) are under an obligation to conduct an investigation. As is apparent from case law, simply checking the registry of the chamber of commerce and the social security number of a service provider is insufficient.[230] Besides the social security number and registration with the chamber of commerce, a value added tax number, a declaration of independent contractor status (VAR declaration)[231] and a residence permit indicating the self-employed status all point in the direction of self-employment. Still, these factors are only indicators which may be countered by a factual situation of subordination.[232] Other indicators considered as evidence of employment were:

- obligations to continue work until it is finished and supervision by the contractor/employer;[233]
- whether the alien involved uses his own tools or whether these are provided by the contractor/employer;[234]
- hourly wage should specify the VAT part of the bill sent to the contractor/employer;[235]
- whether the contract is sufficiently specified so that the service provider/employee can perform his activity with or without additional guidance.[236]

In a thorough analysis of the case law, Tjebbes indicates that in cases involving the tax authorities checking whether Dutch nationals are self-employed, the criteria seem to be less strict.[237] In a case where this difference was forwarded as an infringement of the principle of equality, the court rejected the argument as the types of inspections are different.[238] While these situations are not similar, as the

228 *Jany*; Franssen 2013, p 227, referring to: Rechtbank Zwolle 4 December 2007 ECLI:NL:RBZLY:2007:BB9745 and Rechtbank Leeuwarden 16 January 2008 ECLI:NL:RBLEE:2008:BC7236. Chapter 3, par 3.3.2.1 and 3.3.3.
229 Tjebbes 2008, p 283.
230 Franssen 2013, p 227, referring to Rechtbank Leeuwarden 19 March 2008 ECLI:NL:RBLEE:2008:BC7236. See also: ABRvS 29 April 2008 ECLI:NL:RVS:2008:BD0784, par 2.2.1.2.
231 A VAR declaration (verklaring arbeidsrelatie) is a document provided by the Dutch tax authorities which indicates the status of a self-employed person.
232 ABRvS 29 April 2008.
233 Franssen 2013, p 228, referring to: ABRvS 21 May 2008 ECLI:NL:RVS:2008:BD2085 and ABRvS 6 August 2008 ECLI:NL:RVS:2008:BD9459.
234 Franssen 2013, p 228, referring to: ABRvS 19 November 2008 ECLI:NL:RVS:2008:BG4749.
235 Franssen 2013, p 228, referring to: ABRvS 23 July 2008 ECLI:NL:RVS:2008:BD8360.
236 Franssen 2013, p 228, referring to: Rechtbank Arnhem 10 April 2008 ECLI:NL:RBARN:2008:BD0147.
237 Tjebbes 2008, p 284-285.
238 Rechtbank Almelo 12 February 2009 ECLI:NL:RBALM:2009:BH2710.

inspections based on the AEA clearly serve a different person than tax inspections. It is clearly questionable why different criteria are used to determine whether someone is self-employed or not.[239]

Posted workers or hired personnel

The subtle difference between posting employees or hiring-out personnel is hard to draw. Prior to the *Vicoplus* case, Dutch courts tried to determine the nature of the economic activity involved on the basis of several indicators. Relevant were whether the service provider had contacted the receiver, whether the bills and confirmation of the contract were sent by the provider and whether the provider used its own tools and transportation to the place of work.[240] Other criteria used relate to the question who directs the employee.[241] Regarding directions provided by the receiver, such as leaving certain authentic elements in place during a renovation, were insufficient to establish a situation of hiring-out, providing directions being normal during a contractual relationship between a service receiver and a provider and its personnel.[242] Additionally, the assignment provided to personnel in cases involving the posting of workers must be sufficiently clear.[243] Other indications of a relationship of authority are provided by the question who has paid for the travel costs, the work clothing and the tools provided.[244] In cases where no end date is provided, or where the receiver determined the type of labour to be performed, the assumption was that the personnel is hired-out. The same held true for situations where the hours of employment determined the height of payment for the services received.[245]

It was the highest Dutch administrative court that has referred questions concerning the difference between posting and hiring-out which resulting in the *Vicoplus* judgment. The Court provided three criteria to establish whether a case concerns the hiring-out of workers. Hiring-out is:

239 Franssen 2013, p 229.

240 Franssen 2013, p 228, referring to: ABRvS 10 September 2008 ECLI:NL:RVS:2008:BF0329; ABRvS 3 September 2008 ECLI:NL:RVS:2008:BE9725.

241 ABRvS 3 September 2008 ECLI:NL:RVS:2008:BE9725.

242 Franssen 2013, p 232, referring to: ABRvS 3 September 2008 ECLI:NL:RVS:2008:BE9724.

243 ABRvS 20 May 2009 ECLI:NL:RVS:2009:BI4562.

244 Franssen 2013, p 233, referring to: Rechtbank Alkmaar 20 August 2008 ECLI:NL:RBALK:2008:BE9494. See also Sanchez Montoto 'Grensoverschrijdende Dienstverlening Ingevolge Artikel 49 van het EG-Verdrag en de Tewerkstellingsvergunningsplicht Ingevolge de Wet Arbeid Vreemdelingen' (2008) 6 *Migrantenrecht*, p 196-197.

245 Franssen 2013, p 234, referring to: Rechtbank Utrecht 19 February 2008 ECLI:NL:RBUTR:2008:BC5318; ABRvS 5 September 2007 ECLI:NL:RVS:2007:BB2923; Rechtbank Roermond 31 October 2008 ECLI:NL:RBROE:2008:BG3045 and the nullification of that judgment by the ABRvS 29 July 2009 ECLI:NL:RVS:2009:BJ4135; ABRvS 14 January 2009 ECLI:NL:RVS:2009:BG9785; Rechtbank Den Haag 6 August 2008 ECLI:NL:RBSGR:2008:BE9111.

> a service provided for remuneration, within the meaning of the first paragraph of Article 57 TFEU, in respect of which the worker made available remains in the employ of the person providing the service, no contract of employment being entered into with the user;
> in the case of hiring-out the movement of workers to another Member State constitutes the very purpose of a transnational provision of services. The contrast with the posting of workers is that posting is ancillary to a provision of services undertaken by that employer in the host Member State;
> a worker who is hired-out, within the meaning of article 1(3)(c) of Directive 96/71, works under the control and direction of the user undertaking. Contrary, in the scenario of article 1(3)(a) the worker remains under the control and direction of the company posting the worker.

The emphasis of the ECJ on the criterion who has control over the employee performing the economic activity might lead to a shift in Dutch case law. In addition, in *FNV Kunsten* the Court indicated that a service provider can lose his status of an independent trader if he does not determine independently his own conduct in the market, if he does not bear the financial or commercial risks and operates as an auxiliary within the principal's undertaking. The Court continues by expressly stating that 'the status of "worker" is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons'.[246] These conditions will likely the defining criteria of Dutch case law.

Consequences of restricting the freedom of movement of workers

As is apparent from Dutch and EU case law,[247] restricting the free movement of workers for recently joined EU nationals is not without complications. The main consequence is that a sharp distinction needs to be drawn between these two fundamental freedoms, which is practically difficult. This leads to misuse on both sides. On the one hand, those wishing to have access to the Dutch labour market, or those wishing to employ labour from recently joined Member States will circumvent the rules applying to employment through bogus self-employment constructions. On the other hand, the national authorities adopt a rather wide policy net to catch such constructions. This leads to the application of the AEA to genuine service providers as well as the fining of 'employers' who are unaware that they are breaching the AEA. Imposing restrictions relating to the freedom of workers, but not to the freedom to provide services leads to practical complications. This

246 Case C-413/13 FNV *Kunsten Informatie en Media* ECLI:EU:C:2014:2411, par 33 and 36.
247 Chapter 3, par 3.4.2.

might not be a viable solution to a perceived problem: the mass influx of workers after accession of new Member States. Moreover, the claim of disturbances of the labour market due to such mass migration is in itself questionable.[248] The here identified demarcation problems and misuse would be avoided if the free movement of workers was not temporarily restricted in relation to newly joined EU nationals. An alternative is the approach chosen by Germany and Austria by negotiating the right to maintain national measures in relation to the posting of workers as defined in Directive 96/71/EC.[249]

5.4.5 Turkish nationals

The Association Agreement signed with Turkey, the Ankara Agreement, has consequences for Turkish nationals providing services in a Member State. A standstill clause applies, which means that from 1 January 1973 no new restrictions may be imposed in relation to service provision. Turkish nationals may directly rely on this standstill clause before Dutch courts.[250] If they have the right to provide services or work in the Netherlands, they should have the right to enter, and reside legally, on the Dutch territory.[251] The AA provides that no residence permit is required for Turkish nationals who have rights of residence based on Decision 1/80 of the Association Council EEC / Turkey, but no reference is made to Article 41(1) Additional Protocol.[252] Article 41(1) Additional Protocol provides a standstill clause, effective from 1 January 1973 which entails the prohibition of new restrictions to the freedom to provide services. The effect of the provision is limited by Article 59 Additional Protocol as Turkish nationals will not enjoy a more liberalized regime that that which applies to EU nationals.[253] In relation to residence permits concerning first admission, charges must be proportional to charges imposed on EU citizens who request residence papers.[254] While slight differences between such charges might be considered proportionate due to differences between the two categories, the differences in this case amounted to more than two-thirds higher for Turkish

248 Chapter 4, par 4.3.

249 The service sectors to which this transitional regime applies are listed in the Annexes. Treaty between the Member States of the European Union and the Republic of Croatia, for example Annex XII relating to Poland, par 13. The listed sectors are *inter alia* construction and industrial cleaning services. The type of services for which transitional measures were adopted only relate to the subject of Directive 96/71/EC, services which lead to movement of workers.

250 Chapter 3, par 3.4.3.

251 Article 41(1) Additional Protocol has direct effect and is interpreted as far as possible in parallel with Article 56 TFEU, Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force - Final Act - Declarations OJ (1964) L293/4.

252 Article 8(1) AA.

253 Chapter 3, par 3.4.3.

254 Case C-92/07 *Commission v Netherlands*, par 13, 53, 55,

nationals, which according to the ECJ were not minimal and therefore disproportionate.[255]

The Dutch legislation relating to mobility for self-employment in 1973 required an assessment on the basis of the Dutch interest. Consequently, Turkish nationals requesting the right to provide services in the Netherlands must be allowed to do so if competition and the labour market in relation to a specific part of the Dutch market is such that the provision of services serves a substantive Dutch interest.[256] As indicated above, whether the Dutch interest is served with the entry of a specific service provider is now determined on the basis of a points-based system.[257] As such, sufficient points for skills and past experience and the specific service provided determine if the permit will be granted. Due to the standstill obligations, the points-based system for self-employed third-country nationals does not apply.[258] The consequence is that if a Turkish service provider does fulfil this condition, a work permit is not required, as the AEA has no obligation to obtain a work permit for the self-employed. *A contrario*, if no sufficient interest is served (on the basis of the rules applying in 1973) the receiver of a service from a Turkish national will not be exempted from the work permit obligation, which means that the AEA regime will apply in full.[259] As sponsorship was introduced in 2013, a sponsor may not be required in relation to Turkish nationals providing services. As self-employed persons do not require a sponsor, this limitation derived from the standstill does not have to be separately implemented. This exception is implemented in relation to various categories involving Turkish nationals relying on the freedom of workers.[260]

5.4.6 Analysis and conclusions implementation EU freedom to provide services

Dutch migration law imposes almost no obligations on EEA nationals providing services in the Netherlands. Naturally, entry refusal and expulsion are codified, but these limitations are derived from EU law itself. The dynamic referral to the definition of services provided under EU law means that the scope of the freedom to provide services is determined in the European legal order. Implementation of rights derived from EU law in relation to Turkish nationals are implemented, but it would be more transparent if the legislation contained a specific overview of the legal regime applying to the self-employed as it applied in 1973.

The implementation of EU rights granted to third-country nationals, in situations involving posted workers and transition citizens is more problematic. As is

255 *Commission v Netherlands* (C-92/07), par 74.
256 Van Wissekerke 2011, p 103-104; ABRvS 29 September 2010 ECLI:NL:RVS:2010:BN9181; ABRvS 15 March 2011 ECLI:NL:RVS:2011:BP8383.
257 Article 3.30 AD.
258 Article 3.20a(4) RoA.
259 As described in this chapter, par 5.2.2.4.
260 Reurs 2014, p 134-135.

apparent from Dutch and EU case law,[261] restricting the free movement of workers while allowing recently joined EU nationals free to provide services is not without complications. The main consequence is that a sharp distinction needs to be drawn between these two fundamental freedoms, which is practically difficult. This leads to misuse. On the one hand, those wishing to have access to the Dutch labour market, or those wishing to employ labour from recently joined Member States will circumvent the rules applying to employment through bogus self-employment constructions. On the other hand, the national authorities adopt a rather wide policy net to catch such constructions. This leads to the application of the AEA to genuine service providers as well as the fining of 'employers' who are unaware that they are breaching the AEA.

The distinction between posting of workers and hiring-out is relevant in relation to transition citizens. The Netherlands imposes a work permit obligation in relation to Croatian nationals, which is justified by EU law as this prevents disturbances to the labour market. However, this argument does not hold in relation to third-country nationals legally employed in other Member States. As long as such employees are posted temporary, thus the home state company remains the employer, hiring-out falls within the scope of freedom to provide services. The purpose and legality of such services may be verified, but only in the form of light information requirements, which certainly excludes a work permit obligation. The imposing of restrictions relating to freedom of movement of workers to transition citizens practically leads to definitional issues and complicated case law. It would be better to abolish this restriction. Another alternative is the approach chosen by Germany and Austria by negotiating the right to maintain national measures in relation to service provision as defined in Directive 96/71/EC.

5.5 Conclusion

Comparing the GATS commitments with the regulations and policy guidelines implementing these commitments reveals that several of these commitments are not implemented correctly. The current defects in the implementation legislation relating to GATS Mode 4 should be remedied. Missing commitments and confusing implementation containing errors is unacceptable when it comes to international commitments undertaken on the basis of reciprocity. The current implementation is, in part due to these errors, highly opaque and achieves the opposite of what the GATS requires, transparency and facilitating Mode 4 service providers. Moreover, implementing GATS commitments in policy guidance does not seem to reflect an appropriate choice of legal instrument for international obligations. Additionally,

261 Chapter 3, par 3.4.2.

GATS liberalization is implemented in the form of exceptions to the general rules contained in the AEA. It is questionable whether rules such as those reflected in the sponsorship system are suitable to deal with GATS Mode 4 service providers. The broad definition in the Dutch legal order entails that service provision by aliens, unless exempted, will fall within the regime that ensures the protection of (permanent) access to the labour market. This is confusing, to which may be added that the entire Dutch migration law and policy relating to this topic is complicated and scattered over various legal Acts. As providing labour in contravention to the Dutch rules leads to fines, and possible loss of the trusted sponsorship status, the consequence might be that perfectly legal service provision is not relied upon to avoid risk. This goes against the heart of the idea to provide a level playing field. The entire notion of dealing with service mobility within a legal framework addressing labour market access is questionable. This warrants a parallel with the European Court of Justice's approach to the issue of service providers posting their (third-country national) workers on the territory of another Member State.

The dividing line between labour and services is hard to draw, which have led to complicated demarcations in the EU legal order. The Dutch definition does not follow this distinction which leads to the application of labour rules to cases involving service provision. The GATS strives towards transparency, yet the Dutch measures implementing GATS are far from transparent. A case can be made that Dutch law violates the obligation not to 'nullify or impair' the content of GATS mode 4 commitments. It is however, quite difficult to assess whether the manner in which mode 4 obligations are implemented would lead to nullification or impairment, as that concept does not lead to an easily assessable norm. Moreover, the most problematic issues with the implementation do not relate to a single article, but to the choice and place within the Dutch legal regime of implementation itself, as well as the concept of sponsorship. Nevertheless, even without a specific breach of GATS obligations, the Dutch implementation certainly does not meet the underlying rationale of the GATS, that is, to reduce barriers and to increase transparency. Instead of facilitating GATS service suppliers, the national rules turn an already complicated topic into a (deliberate) legal complexity that is difficult to comprehend, let alone utilize in practice.

Considering the liberalization provided and the related conditions and limitations, it is hardly surprising that the GATS mode 4 type of work permit has never been granted in the Netherlands.[262] As the type of services covered by the Mode 4 commitments are mostly provided by high skilled workers, employers are better off following the Dutch highly-skilled entry scheme. The Member States are re-

262 De Lange indicates that until 2005 no work permit was granted on the basis of the rules implementing the GATS mode 4 commitments, De Lange, 2007, p 252. An interview with personnel from the Dutch Centre for Work and Income confirmed that no GATS work permit was granted between 2005 and the date of the interview, interview UWV (10 December 2010).

quired to deliver on Mode 4 commitments.[263] However, both the commitments and the implementation legislation contain various errors. The topic itself is highly confusing and this may even be deliberate. Certainly, the GATS aims of transparency and progressive liberalization are not upheld. A simple obligation, such as the creation of an information contact point is not kept. One cannot shrug the feeling that the topic itself is not taken seriously, both from a commitment perspective and from an implementation perspective. A possible solution for the oddities relating to the application of the access to the labour market rules, as well as the application of sponsorship is the creation of a specific GATS Mode 4 residence permit, as requested by a group of developing countries.[264] This proposal is not without obstacles, as is extensively described by Cho. Three challenges are indicated, the risk of overstaying, the binding legal nature of a GATS visa, once it is accepted in commitments, and the limited practical use as the underlying Mode 4 commitments are limited.[265] However, these problems hold true without a specific GATS visum as well. By whatever means GATS Mode 4 commitments become practically useable, there is a risk of overstaying, the commitments become enforceable and the commitments themselves remain limited. What this visum will achieve is the implementation of service mobility in a separate legal regime than the regime applying to labour. If the Netherlands takes its Mode 4 commitments seriously, it is simple to create a legislative regime, to which the general refusal grounds apply, separate from all the administrative hurdles that currently apply.

The differences in conditions applying to EU and GATS service suppliers are vast. As is the purpose of the creation of a single market, EU nationals almost have unrestricted access, the main difference with Dutch nationals being the possibility of refusal of entry or expulsion relating to the exceptions provided under EU law. For Turkish nationals, the regime that applied in 1973 is applicable. If that regime does not lead to a right to provide services, the normal regime applying to third-country nationals applies. The temporary restrictions relating to the free movement of workers for transition citizens are troublesome. They lead to definitional problems, as it is required to draw a line between service provision and labour. It is clear from case law that both the authorities, as well as economic actors, have problems to do so. As mistakes may lead to fines, and consequently fears over these fines, the use of these new citizens is made less attractive which distorts the level playing field which should be present in relation to services markets. A legal sys-

263 Chapter 2, par 2.7.

264 General proposal made by a group of developing states represented by India, requesting the creation of a GATS visa separate from the national rules applying to other forms of migration. One of the issues addressed in this proposal is the problem of treatment of temporary and permanent labour flows in the same national immigration procedure, see the overview provided in a factsheet on the ILO website: <http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=54> (last visited 1 October 2015).

265 S Cho 'Development by Moving People: Unearthing the Development Potential of a GATS Visa' in C Thomas and JP Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press, Oxford 2009), chp 17 par d(ii).

tem certainly should impose some form of enforcement to its obligations. However, sanctions become problematic when the legal rules are non-transparent. The other side of this coin is that employers abuse this difficult division to employ new EU citizens under the guise of providing services. It might be best to avoid these restrictions altogether. Regarding the posting of workers, it is clear that the Dutch legislator and authorities have a problem with the acceptance of third-country national employees performing service contracts for their employer. Case law from the ECJ demonstrates that the only condition that may be imposed relates to verification of the legal residence and employment of the posted worker in the home state. This case law should be observed, the posting of workers is simply part of the freedom to provide services as the conditions of competition on services markets are distorted if service providers from other Member States face difficulties when bringing their own personnel. The Dutch legislation in relation to hiring-out services needs to be brought in line with ECJ case law, as a work permit regime may no longer be imposed in relation to third-country nationals.

Chapter 6

Implementation of service trade liberalization in UK law and policy

6.1 Introduction

This chapter will begin with a description of the regime applicable to non-EEA nationals and those enjoying movement rights under the General Agreement on Trade in Services. As such, an overview of the Points-Based System as well as any relevant general or additional rules applying to leave, entry, stay and employment will be provided. The United Kingdom has also implemented obligations derived from other international agreements relating to service mobility, essentially plurilateral Free Trade Agreements, such as the CARIFORUM agreement, signed between the EU and groups of other States. As these are similar in nature and implemented in the same paragraphs, these will be discussed in parallel. This will be followed by a description of the legal regime relating to European Economic Area nationals, the transitory regime relating to Croatian nationals, the rules ap-

plying to posted workers of EEA based service providers, and finally the position of Turkish nationals.[1]

The description of UK migration law and policy relating to service providers will demonstrate interesting parallels with the conclusions drawn in the Dutch chapter. As was the case in that chapter, the emphasis will lie on the three main conditions to provide services in another state; entry, residence and the right to perform an economic activity. Most diversifications concerning these rights are the consequence of international obligations applying to both the Netherlands and the UK. As such, UK immigration control is based on differing regimes relating to nationality or the purpose of entry, and these regimes are to a certain extent comparable with the Dutch regime. It is therefore possible to use a similar structure to address this topic as that of the previous chapter. It is helpful to compare the different legal regimes created to implement international obligations with the general regime of entry, employment and the right to provide services for third-country nationals. This exercise will demonstrate the results of service trade liberalization. The UK immigration and access to the market rules applying to EEA nationals are implemented in a separate legal regime. GATS Mode 4, and other obligations vis-à-vis non-EEA nationals are mostly incorporated in the legal regime that applies to third-country national migrant workers. The implementation of EU rights derived from the free movement of service providers can be found in the Immigration (European Economic Area) Regulations 2006.[2] whereas non-EEA nationals need to comply with the Immigration Rules and the Points-Based System (PBS).[3]

A review of the implementation of the identified international obligations in UK law will lead to an overview of possible conflicts. As with the Dutch implementation of GATS obligations, two major problems arise from the choices made in relation to this implementation.[4] GATS obligations relate to service provision, yet the implementation of these obligations is adopted in a regime that addresses labour migrants. In particular the application of sponsorship to GATS service providers can be problematic. Second, the GATS aims at transparency of domestic rules. As will be clear from the overview provided below, the conditions applying to GATS Mode 4 are rather complex, subject to frequent changes and use is made of policy guidance. It is not easy to locate and clearly identify GATS mobility rights within

1 See for an explanation of this division into EEA nationals and non-EEA nationals, as well as an explanation for each of the sub-categories chapter 5, par 5.1. See also Clayton indicating an initial distinction between EU nationals, nationals of countries which are signatories of association agreements with the EU and third-country nationals, which now has to be classified into a broader variety of categories, G Clayton *Textbook on Immigration and Asylum Law* (Oxford University Press, Oxford 2014), p 138-139.

2 The Immigration (European Economic Area) Regulations 2006, SI 2006/1003.

3 The Points-Based System is part of the Immigration Rules, see part 6A, an overview of these rules can be found at: <https://www.gov.uk/government/collections/immigration-rules> (last visited 1 October 2015). These rules are frequently changed and reference to the immigration rules throughout this chapter relates to the versions applying on the 1st of March 2015.

4 A more extensive description of these issues is provided in chapter 5, par 5.1.

this legal system. This might in itself breach Mode 4 commitments undertaken by the UK. Moreover, the problems do not relate to a single provision, but rather to the entire means of implementation. These main problems do not expressly run counter to GATS obligations, but they do infringe the method and the underlying rationale of the GATS. These issues will not be addressed in this chapter, as they are relevant to the Dutch implementation of GATS Mode 4 commitments as well. The legal analysis of these issues is therefore left to the final chapter.[5]

6.2 UK Immigration and Labour Market Rules for third-country nationals

6.2.1 Introduction

The UK Immigration Rules apply to all persons that are not covered by the EEA Regulations 2006.[6] The Points-Based System is part of the Immigration Rules and it regulates most entries related to employment and education, including the entry schemes forming the implementation of GATS obligations. However, the GATS Mode 4 commitment relating to business visitors are covered by rules outside the Points-Based System. Before providing an overview of the Immigration Rules, it is useful to provide background information relating to the PBS. Not only is the PBS the main set of rules applying to entry of third-country nationals for work and study purposes, its creation, introduction and latter modification reflect the changes in UK governmental thinking towards migration policy.[7] The Points-Based System was launched and mostly implemented between 2008 and 2009, replacing roughly 80 established entry routes.[8] Most of the old entry schemes, both national preferences as well as those derived from international concessions, are included in one of the five tiers of the PBS. Very few entry routes for non-EEA nationals were left outside the PBS.[9] As such, the PBS reflects the current UK policy concerning entry of third-country nationals. The Labour government, coming into power in 1997, was confronted with an increasing demand for foreign labour across a wide range of sectors of the UK economy.[10] Companies, pitched towards

5 Chapter 5, par 5.5, chapter 7, par 7.5.3.
6 Immigration Rules, par 5; EEA Regulations 2006.
7 D Seddon (ed) *Guide to the Points-Based System* (JCWI, London 2010), chapter 1.
8 Seddon 2010, p 37, a useful overview of the old entry routes and their corresponding tier and category can be found at p 38-40.
9 Seddon 2010, p 319.
10 In comparison with the earlier Labour government, this government changed its thinking from hostile to business towards an open economy trying to cope with the challenges of the reality of globalization, Seddon 2010, p 4. See for a brief account of the previous migration policy approach: B Ryan Labour Migration and Employment Rights (The Institute of Employment Rights London, London 2005), p 16-17. See for a more detailed account of the history of UK immigration law Clayton 2014, par 1.2.

competing on a global scale, increasingly wanted to recruit their workforce from an international pool of talents, raising the demand for highly skilled foreign workers. The same holds true for companies employing low skilled workers on a large scale. The year 1997 also marked the beginning of a decade of economic growth and a further shifting in nature from a manufacturing to a service-based economy.[11] Additionally, the UK economy was one of the most open economies in the world. Hence, globalization and the activities of pro-migration actors are seen as catalysts for the changes to the UK labour migration adopted by the Labour government.[12] The Labour government accepted migration as an inevitable reality and envisaged a high-tech, knowledge-intense, innovative and scientific British economy.[13] As such, this required a more flexible immigration policy.[14] The emphasis would lie on managed migration in which immigration policy is no longer only focused on limiting numbers. Migrants that can demonstrate their economic usefulness would be admitted.[15] Hence, the introduction of a system in which points are attributed to certain wanted qualities, such as skills and language. If a migrant obtains enough points relevant to a specific entry route, this economic usefulness is, from the policy perspective, warranted. On the other hand, the policy emphasized the necessity to curtail unauthorized entry and overstaying.[16]

The GATS Mode 4 commitments were concluded during this period and they reflect this bias towards attracting the highly skilled. However, after 2005 other factors began to influence government thinking on immigration policy. A combination of a more hostile public opinion, negative media coverage of immigration, political opposition to the Labour government's immigration policy and a greatly increased volume of entrants from Eastern Europe led to a shift in the government's policy.[17] The government published a series of publications shaping a blue print for the PBS in 2005.[18] The old system was said to be administratively slug-

11 Seddon 2010, p 4; Ryan 2005, p 16-17.

12 Seddon 2010, p 4-5, describing a 'policy community' consisting of businesses, employer associations, legal firms representing business interests, research institutes and think tanks such as the Institute for Public Policy Research. Notably this included governmental departments other than the Home Office, in particular the Treasury.

13 Similar expressions were made by the Dutch government when the Modern Migration policy was developed, chapter 5, par 5.2.2.3.

14 See: W Somerville, 'The Politics and Policy of Skilled Economic Immigration under New Labour 1997-2010' in T Triadafilopoulos (ed) *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (Springer, New York 2013), p 260-261. This thinking is reflected in the UK Government Department of Trade and Industry White Paper 'Our Competitive Future: Building the Knowledge Driven Economy' Cm (1998) 4176, executive summary and par 1.5. In the checklist of commitments (collaborate to compete) the paper recommends to: 'examine whether there is scope to lower barriers to immigration that prevent entrepreneurs and skilled professionals from coming to or remaining in the UK and welcome suggestions from business'. See also: Ryan 2005, p 17; and: UK Government Department Home Office White Paper 'Secure Borders, Safe Haven – Integration with Diversity in Modern Britain' Cm (2002) 5387.

15 Home Office 2002, executive summary, par 11-12.

16 Home Office 2002, executive summary par 23; Ryan 2005, p 17-18.

17 Somerville 2013, p 266-267.

18 UK Government Department Home Office 'Controlling our borders: Making migration work for Britain, Five year strategy for asylum and immigration' Cm (2005) 6472; UK Government Department Home Office Con- →

gish, inefficient and not flexible enough to satisfy labour market demands. Clear conditions would allow applicants to perform self-assessments. The new system would also be less subjective, leading to a decrease in judicial procedures lengths, as well as fewer errors which result in appeal.[19] The final implementation of the PBS was performed under different circumstances than those applying at the start of its creation. During the implementation process, the system was not only fine-tuned but also tightened.[20] The severe 2008 recession, as well as concerns over abuse[21] of economic routes, led the government to restrict entry routes. From the introduction, entry for low-skilled workers was suspended due to the high level of migration from within the EEA.[22] Also important for the manner in which the PBS system was applied was the fact that after the general elections in 2010 the Labour government was not re-elected. This led to the change to the Coalition government of the Conservative Party and the Liberal Democrats.

The Coalition programme for government indicated the introduction of 'an annual limit on the number of non-EEA economic migrants admitted into the UK to live and work'. The government's immigration policy is to make sure that immigration is controlled so that people have confidence in the system, to ensure cohesion and to protect public services. The idea to introduce this annual limit, or cap, on non-EEA migrants and to reduce migration from the 'hundreds of thousands to the tens of thousands' was part of the 2010 election campaign of the Conservative Party.[23] This shift in thinking regarding economic migration from managed migration to bringing down the numbers is visible throughout the immigration rules on economic migration and the series of changes to the PBS that have tightened entry conditions. The introduction of the cap is exemplary in this regard. While entry routes for the low skilled were suspended from the introduction, the cap applied to skilled and even highly skilled workers.[24] Consequently, crunching down numbers

sultation Paper 'Selective Admission: Making Migration Work for Britain' July 2005; Home Office, Command Paper, A Points-Based System: Making Migration Work for Britain, Cm (2006) 6471; UK Government Department Home Office Consultation Paper 'A Consultation on a New Charging Regime for Immigration and Nationality Fees' October 2006; UK Government Department Home Office Consultation Paper 'A Consultation on Establishing a Migration Advisory Committee' November 2006.

19 Clayton 2014, p 21; Seddon 2010, p 11-12.

20 Examples are the raising of earnings thresholds, more restrictive employment conditions and a more onerous resident labour market test.

21 An example is the concern over students entering for work purposes instead of study purposes, which was specifically included in the Coalition Programme for government, 20 May 2010, immigration paragraph, p 21, available online: <https://www.gov.uk> (last visited 1 October 2015).

22 Seddon 2010, p 3 and 19; in March 2015 this tier was still suspended.

23 Coalition Programme for government, immigration paragraph, p 21. Interestingly the other Coalition party, the Liberal Democrats, heavily criticized the idea during the campaign, the Liberal Democrat Home Affairs spokesperson calling the idea 'at best ludicrous and at worst disastrous for the UK economy'. Though implemented, the cap still caused friction in the government. Business Secretary Vince Cable was reported as commenting that the interim cap had caused 'a lot of damage to British industry', Seddon 2010, p 22 and 56. See also: Clayton 2014, p 25.

24 Amending statements to the Immigration Rules, HC 59 (for tier 1 (General)) and 96 (for tier 2 General). This cap started out as an interim measure to prevent a surge of applications and entries in anticipation to the introduction of a more permanent cap in April 2011: Amending statements to the Immigration Rules, HC 59, 28 →

became a general objective, which represents a shift from the previous attracting the needed and the brightest policy. Further emphasizing the increasing push towards controlling migration, the UK government proposed to abolish the right to appeal any immigration decision, replacing it with administrative review. The seriousness of this proposal is pointed out by Clayton as 'approximately 18 per cent of administrative reviews result in the original decision being remade whereas in 2012 50 per cent of immigration appeals succeeded'.[25]

6.2.2 The Immigration Rules

6.2.2.1 Entry

For non-EEA citizens, entry to the UK requires leave to enter.[26] Depending on the purpose, duration of stay or the nationality of the entrant, the stronger form of entry clearance can be required.[27] Entry clearance takes the form of a visa for visa nationals, and an entry certificate for those who do not require a visa.[28] Entry clearance must be applied for from outside the UK.[29] Applicants must travel to a designated British post overseas because of biometrics requirements. Almost all applicants must submit their biometrics, finger scans and a digital photo, which are taken at a visa application centre.[30] Certain fees apply and an entry clearance application is considered not made without payment.[31] Entry and entry clearance will be refused if the conditions relating to the purpose of stay are not fulfilled or if the general refusal grounds are not complied with. As such, these refusal grounds address the individual migrant. The general refusal grounds relate to persons who are the subject of a deportation order[32] or have been convicted of offences leading to imprisonment. The duration of imprisonment is relevant, as a sentence of imprisonment up to a year (thus including a sentence of one or more days) will lead

June 2010, explanatory memorandum, par 7.4; Amending statements to the Immigration Rules, HC 96, 15 July 2010, explanatory memorandum, par 7.4; see also: UK Government Department Home Office UK Border Agency Consultation Paper 'Limits on Non-EU Economic Migration' June 2010. Note that the Coalition government had not formed at the time. As such, the parliament was a hung parliament and therefore the cap approach was a high profile, but risky approach. The UK Border Agency (UKBA) was a department of the Home Office that existed from 2007 to 2012, see Clayton 2014, par 2.2.2.

25 Clayton 2014, p 25.

26 Immigration Rules, par 7 and par 17A. Note that the UK, the Channel Islands, the Isle of Man and the Republic of Ireland together form a common travel area, leave for entry to one part normally does not require leave for another part from within the area, Immigration Rules, par 15.

27 If entry clearance is obtained, the rules governing the grant or refusal of leave to enter are considered to be complied with, Immigration Rules, par 26.

28 Immigration Rules, par 24 and 25; see also par 23, indicating that entry clearance is not required for non-visa nationals seeking leave to enter for a period not exceeding six months.

29 Immigration Rules, par 28; as is the case under the Dutch rules, chapter 5, par 5.2.2.2.

30 Exceptions are persons such as diplomatic officials. If there is no designated British post present in the country of residence, the applicant must apply in another country.

31 Immigration Rules, par 30.

32 Immigration Rules, par 320(2)(a).

to refusal until five years have passed since the end of the sentence. For those sentenced between one to four years the period during which entry will be refused is ten years. Finally, four years of imprisonment or longer will always lead to refusal of the person seeking entry clearance.[33] Refusal can be based on medical reasons as well.[34] Failure to provide a valid passport, or, if required, a visa will lead to refusal, [35] as will false representation or false documents.[36] Moreover, previous breaches of UK immigration laws will also lead to refusal. As with imprisonment, some breaches (such as deception in an application for entry clearance) will lead to refusal for a period of ten years, whereas other breaches (such as overstaying for longer than 90 days) will always lead to refusal.[37] Grounds that will normally lead to refusal, indicating discretion and more leniency, relate *inter alia* to failures to demonstrate proper documents, previous attempts to significantly frustrate the intention of the Immigration Rules and convictions leading to non-custodial sentences.[38] Besides refusal of entry clearance, various grounds exist to refuse leave to enter for persons who already have entry clearance,[39] to cancel leave to enter or remain,[40] to refuse leave to remain[41] and to curtail leave to enter or remain.[42]

A problematic issue to be investigated in relation to these refusal grounds is the fact that they have become more strict. Taking the refusal ground related to previous imprisonment as example, the appear in the Immigration Rules in July 2012. Moreover, the first version of this rule is less strict than the rule in 2015.[43] This means that conditions relating to entry have been tightened since the entry into force of the GATS Mode 4 commitments on 30 January 1996.

6.2.2.2 Overview of the Points-Based System

The approach adopted in the PBS has the following general features. Entry routes are categorized into five general tiers, each consisting of various sub-categories. Whether an application for leave, entry and where relevant, the right to work is successful depends on the amount of points awarded to the migrant seeking entry. Basically, the system makes sure that conditions applying to potential entrants, such as proper qualification, or the need to have a job offer, are met as fulfilling

33 Immigration Rules, par 320 (2)(b).
34 Immigration Rules, par 320 (7).
35 Immigration Rules, par 320 (3) and (5).
36 Immigration Rules, par 320 (7A).
37 Immigration Rules, par 320 (7B).
38 Immigration Rules, par 320 (8)-(18B).
39 Immigration Rules, par 321.
40 Immigration Rules, par 321(A).
41 Immigration Rules, par 322.
42 Immigration Rules, par 323.
43 Refusal could be based on a 'conviction of an offence which, if committed in the United Kingdom, is punishable with imprisonment for a term of 12 months or any greater punishment', Immigration Rules July 2012 version, par 320 (18).

these conditions is the only way to have the necessary amount of points awarded. Besides the need to fulfil these conditions, applications can be rejected based on the in the previous paragraph described general refusal grounds.[44] An important feature of the system is the need to obtain a sponsor for several categories of migrants wishing to work or study in the UK, including intra-company transfers and the temporary worker category which includes service providers. Each tier and subcategory has different point requirements, and the number and the manner in which points are awarded varies as well. There are three categories for which points can be obtained: attributes, maintenance and English language. These categories remain separate from one another. Thus points awarded in one category only work towards the threshold of that same category. While all PBS tiers and subcategories require points to be obtained for attributes, the language requirement only applies to tiers 1 and 2. Maintenance requirements apply to most, but not all categories. Appendices to the Immigration Rules, as well as supplementary policy guidance specify how the points are allocated.[45] A specific guidance for BV exists as well.[46]

As is apparent from the three categories and the awarding of points, migrants need to demonstrate that they are eligible to enter the UK under the conditions that apply to the specific tier and sub-category for which they apply. As such the attributes category awards points for qualifications, previous work experience in the UK, previous earnings, age (the younger the better), investment, whether the migrant has a job offer, is an intra-company transferee or will follow studies. The applicant's level of English is seen as important regarding the applicant's chances of success to work and integrate into the UK. Finally, the maintenance requirements are intended to make sure that the applicant can support himself, and any accompanying dependants.[47] The idea of a points-based system is to set a minimum level of qualifications and skills which allows the person applying under such a system to compensate a lack in certain areas with a more than average score in other are-

44 Immigration Rules (part 9), par A320-324.

45 UK Home Office, Tier 2 of the Points-Based System – Policy Guidance, version 3/15; UK Home Office, Tier 5 (Temporary Worker) of the Points-Based System – Policy Guidance, version 3/15; UK Home Office, Tier 2 and 5 of the Points-Based System Policy Guidance for Sponsors, version 11/14; UK Home Office, Tier 2, Tier 4 and Tier 5 of the Points-Based System – Sponsor Guidance Appendix A, version 4/14; UK Home Office, Tier 2, Tier 4 and Tier 5 of the Points-Based System – Sponsor Guidance Appendix B, version 9/13; UK Home Office, Tier 2, Tier 4 and Tier 5 of the Points-Based System – Sponsor Guidance Appendix C, version 1/13; UK Home Office Sponsor Guidance tier 2 and 5 Appendix F, version 4/13. The indicated versions are those applying on the 1st of March 2015. Unless expressly indicated, all references are to the here indicated versions. The latest version, as well as previous versions of the Immigration Rules and Policy Guidance can be found at: <https://www.gov.uk/government/collections/immigration-rules> (last visited 1 October 2015).

46 Business Visitors Guidance, version 11/14. These rules will change on the 24th of April 2015, see: Statement of Changes in Immigration Rules, HC 1025, 26 February 2015; Draft Visitor Rules v.final, 6 April 2014, introduction; Draft Visitor Guidance (E) v.final, 14 October 2014.

47 Seddon 2010, p 53; see for example: Policy Guidance tier 2, par 153.

as.[48] However, the UK PBS hardly provides for this option, as the original flexibility has become rigid overtime.[49] For the GATS categories of Mode 4 service suppliers incorporated in the PBS, no flexibility is provided at all and all conditions must simply be met.

6.2.2.3 The status of the Immigration Rules and relying on policy guidance

The legal status of the Immigration Rules is a much debated topic. The competence of immigration control is derived from statutes, of which the Immigration Act 1971 provides the main legal authority for the Immigration Rules.[50] The Immigration Rules reflect the actions that should be taken in circumstances as set by the UK administrator and 'should not be seen as a legal text in the English tradition, namely as language which has been created with great precision and therefore must be interpreted strictly'.[51] While these rules are guidance of those who administer the Immigration Act and therefore may seem policy, case law has placed these rules to a status comparable to that of law.[52] The Immigration Rules are under limited Parliamentary control as there is no possibility for amendment leading to a rejection as a whole. New rules are created at least every month on average, and time to debate these in Parliament is rare.[53] Moreover, the Immigration Rules, and the PBS specifically, strongly relies on policy guidance, for instance to indicate specific documents that need to be provided as evidence of fulfilling a condition.[54] Various conditions that apply to companies wishing to obtain a sponsor licence are also included in policy guidance.[55] However, including such details in the guidance is controversial as the guidance documents can be changed by Ministers or by officials without placing then before Parliament. Moreover, policy guidance can be changed overnight. As such, the introduction of the quotas of tier 1 and tier 2 through policy guidance was declared unlawful as the limits imposed by it were not placed before Parliament.[56]

The use of policy guidance creates flexibility and prevents that minor details have to be arranged through legislative procedures. However, overnight introduc-

48 See for an overview of comments as to how flexible the PBS is: House of Commons, Home Affairs Committee 'Managing Migration: the Points Based System' thirteenth report of session 2008-09, volume 1, p 35-39.
49 Clayton 2014, p 309.
50 Clayton 2014, p 30-31; the last set of new rules are the Immigration Rules (HC 395) of 1994. The current Immigration Rules contain all the changes made to these rules which are made through Statement of Changes in Immigration Rules (HC 395).
51 Clayton 2014, p 31, referring to: *Alexander v Immigration Appeal Tribunal* [1982] 2 All ER 766, par 11; confirmed in *Odelola* (FC) v SSHD [2009] UKHL 25 and *Mahad and others v ECO* [2009] UKSC 16.
52 Clayton 2014, p 32, referring to *Pearson v Immigration Appeal Tribunal* [1978] Imm AR 212 and *SSHD v Pankina and others* [2010] EWCA Civ 719, par 17.
53 Clayton 2014, p 32-33.
54 See for various conditions applying to the submission of these documents: Immigration Rules, par 245AA.
55 Seddon 2010, p 40.
56 *R (on the application of JCWI) v SSHD* [2010] EWHC 3524, see: Seddon 2010, p 58-59.

tion of new conditions without the need to lay such changes before Parliament raises issues of uncertainty as well as unaccountability.[57] The *Pankina* ruling provides that policy guidance may not be used to introduce new substantive requirements. As such, adding a requirement that funds must be available for at least three months by incorporating it in the policy guidance was deemed unlawful.[58] Essentially, this entails a distinction between the Immigration Rules and guidance in the sense that criteria reflected in the guidance may not be compulsory.[59] Sudden changes can indeed be problematic. Too many changes on short notice without information requirements create uncertainty and make it hard to adapt.[60] Significant changes do not occur overnight. High-level structural changes, such as amendments made to the PBS itself and the introduction of the cap, occur once or twice a year, and are announced well in advance. However, low-level changes, which fill in details or correct a missed point, do occur more frequently.[61] As indicated in the previous chapter, the ECJ considers policy guidance to be an inappropriate instrument in relation to the implementation of EU law, due to its ramifications on legal certainty. The same reasoning could apply in relation to implementation of GATS commitments.[62]

6.2.2.4 Sponsorship

Sponsorship under the Points-Based System entails that those who have an interest in the migrant to enter the UK are given responsibilities relating to the application, stay and return of the migrant. The Sponsor Guidance provides two principles that reveal the intent of the introduction of sponsorship.

57 Seddon 2010, p 40.

58 *SSHD v Anastasia Pankina* [2010] EWCA Civ 719. See for a more thorough explanation of the Pankina case: Seddon p 40-47; As the Home Office subsequently introduced the condition in new Immigration Rules, this requirement is now contained in Immigration Rules, Appendix C, par 1A(b). The *Pankina* ruling was confirmed in R (*on the application of Alvi*) v SSHD [2012] UKSC 33, par 94. The *Bapio* case contains a similar ruling, though the case did not concern the PBS. External guidance with the intentional side effect of restricting rights granted under the Immigration Rules was deemed unlawful by the House of Lords, *R (on the application of Bapio Action Limited and another) v SSHD and another* [2008] UKHL 27.

59 Clayton 2014, p 35-36.

60 Interview CapGemini UK (20 May 2011); similar: interview FergusonSnell immigration advice (21 June 2011).

61 Interview FergusonSnell immigration advice (21 June 2011), interview United Kingdom Border Agency (UKBA) (21 June 2011), interview Kingsley & Napley lawyers (22 June 2011). The example of an announcement made in March 2010 relating to tier 2 (ICT) that settlement no longer applies. The change was introduced in April 2010 and the rule was changed again in April 2011; keeping track is likely to be an issue for smaller companies, interview FergusonSnell immigration advice (21 June 2011); these changes are not so sudden, there are prior warnings. Though there are 2 to 3 big changes to the system a year and much more smaller changes (such as the height of fees). It is necessary to keep track to avoid surprises, interview Kingsley & Napley lawyers (22 June 2011).

62 Chapter 5, par 5.3.1.

> a) Those who benefit most directly from migration (employers, education providers or other bodies who are bringing in migrants) should play their part in ensuring the system is not abused.
> b) We need to make sure that those applying to come to the UK for work or to study are eligible and that a reputable employer or education provider genuinely wishes to take them on.[63]

Sponsorship is required for those wishing to bring migrants to the UK under the following categories: tier 2 (General) (ICT) (Ministers of Religion), tier 4 (General student) (Child Student) and tier 5 (Creative and Sporting), (Religious Worker), (Charity Worker), (Government-authorised Exchange), (International Agreement). While tier 3 is currently closed, the fact that a job offer is required would entail that applications for low-skilled workers requires sponsorship. Tier 1 migrants do not require a sponsor, nor is sponsorship required for routes outside the PBS,[64] including BV. The GATS Mode 4 ICT category is implemented in tier 2 (ICT), the GATS contractual service supplier category is implemented in tier 5 (International Agreement) and GATS business visitors can rely on the business visitor entry route. Thus, sponsorship is required for ICT and contractual service suppliers. A successful application for entry routes requiring sponsorship requires a Certificate of Sponsorship (CoS). It is not possible to act as a sponsor without a sponsor licence. In order to obtain a sponsor licence, various conditions, mostly contained in the sponsorship guidance, need to be fulfilled.[65] Simultaneously, for migrants requiring a sponsor, it is not possible to obtain the required points for attributes without a CoS.

There are two types of sponsor licences, an A licence and a B licence. The A licence is valid for four years after which renewal is required.[66] Furthermore, it is possible for sponsors to obtain a highly trusted sponsor status.[67] Those not fully complying with the requirements for sponsors may be downgraded to a B licence, which is more limited and leads to more inspections. The B licence involves an action plan to make sure that sponsors comply with what is required of them in due time. If the action plan is not kept or if no improvement is shown, the sponsor will lose the licence. [68] The sponsorship system asserts control over the manner in

63 Sponsor Guidance tier 2 and 5, par 1.1.
64 Seddon 2010, p 80-81.
65 The rules and documents explaining these requirements can be found on the UK visa sponsorship for employers page: <https://www.gov.uk/> (last visited 1 October 2015).
66 Sponsor Guidance tier 2 and 5, par 2.9 and 2.2.
67 Sponsor Guidance tier 2 and 5, par 10.6. Note that this version of the Sponsor Guidance contains an error in the number sequence, as there are two paragraphs numbered 10.6. The reference made here is to the second. Further information concerning the highly trusted status can be found at the UK premium sponsorship status website: <https://www.gov.uk/employer-sponsorship-join-the-premium-customer-service-scheme> (last visited 1 October 2015).
68 Sponsor Guidance tier 2 and 5, par 18, see for the action plan par 18.12-18.22.

which a sponsor manages its dealings with migrants, in particular matters that relate to human resources divisions. Sponsors must assign several roles relating to sponsorship to their personnel. The failings of personnel performing these roles can influence future decisions regarding sponsorship licences, as well as provoke enforcement actions.[69] In order to check compliance with the sponsor obligations, the Home Office can perform risk-based inspections.[70]

The sponsorship guidance indicates the following general questions as central to the decision to grant a licence:

> Are you a genuine organisation operating lawfully in the UK? To prove this, you must provide certain documents (...).
> Are you honest, dependable and reliable? To judge this, we look at your history and background, the Key Personnel named on your application and any people involved in your day-to-day running (...).
> Are you capable of carrying out your sponsor duties? We judge this by looking at your current human resources and recruitment practices to make sure that you will be able to fulfil your sponsor duties. We may do this by visiting you before your licence is granted. We may also visit you after a licence has been granted and if we have any concerns at that point we may take action against you (...).[71]

These general conditions are further specified into several requirements. Applicant sponsors need to submit various documents to verify that they are based in the UK, that they are operating or trading lawfully in the UK, and to validate the application.[72] Furthermore, applicant sponsors need to meet the suitability criteria, which means effectively running a human resources system and having reliable personnel.[73] The UK authorities, the Home Office, checks compliance and rates performance in relation to the sponsorship obligations.[74] The sponsor and relevant persons[75] working within the sponsor's organization should not submit false information, have received relevant civil penalties or criminal convictions.[76] These

69 Sponsor Guidance tier 2 and 5, par 6.19 and 6.23. Note that one person can function in more than one of these roles, see par 6.1 and 6.3; Seddon 2010, p 95.
70 Sponsor Guidance tier 2 and 5, par 17.1-17.7; Seddon 2010, p 100.
71 Sponsor Guidance tier 2 and 5, par 1.5.
72 Sponsor Guidance tier 2 and 5, par 7.2-7.3 and Tier 2, Tier 4 and Tier 5 of the Points-Based System – Sponsor Guidance Appendix A; see also, Seddon 2010, 84-85.
73 Sponsor Guidance tier 2 and 5, par 7.4-7.5.
74 See in general the UK visa sponsorship for employer's website: <https://www.gov.uk/> (last visited 1 October 2015); UK Home Office, Full guide for employers on preventing illegal working in the UK, version 10/13.
75 Relevant persons are: owners, directors, persons involved in the day-to-day running of the organization, persons indicated as authorizing officer and all personnel assigned roles in relation to sponsorship.
76 Sponsor Guidance tier 2 and 5, Annex 1 under f. See also Tier 2, Tier 4 and Tier 5 of the Points-Based System – Sponsor Guidance Appendix B. These offences range from facilitating illegal entry and forging immigration related documents to trafficking for sexual exploitation. Relevant civil penalties include those received based on offences listed in Tier 2, Tier 4 and Tier 5 of the Points-Based System – Sponsor Guidance Appendix C, penal- →

convictions relate to illegal employment and other offences in the sphere of migration and employment of migrants. Moreover, these persons should not have a history of other forms of non-compliance. In short, those working at key positions and those responsible for overseeing the migrant employees should have a clean track record or the decision regarding a sponsor licence may be refused. Finally, under all tiers requiring sponsorship, the sponsor has to agree to comply with the ongoing duties of sponsorship.[77]

The B sponsorship licence is meant to be transitional and action plans should lead to improvement and the awarding of an A licence.[78] Due to failures to observe the sponsor duties, or due to personal offences of relevant staff, an A licence can be downgraded.[79] A serious consequence of a B licence is that the sponsor is not allowed to assign new CoS, though the sponsor is allowed to retain already existing CoS.[80] Furthermore, an action plan must be implemented for which a fee is due. Finally, a B licence holder is likely to be inspected more frequently and extensively.[81]

All tier 2 and 5 sponsors can apply for a premium sponsor (for large organizations) or an SME+ sponsor licence. The idea is to offer support to the organization for all migrant workers and to develop a relationship between the authorities and the organization. The benefits in comparison with a normal A rated licence are direct access in several instances, such as to a licence manager or to the public enquiry offices. Moreover, the premium status leads to priority treatment, for instance regarding visa services overseas and changes to a sponsor licence.[82] March 2015 the fees for these upgrades were £25.000 a year for the premium sponsor licence and £8.000 a year for the SME+ licence. As will be clear from the height of the fees, this system can be quite useful for a large multinational firm, but not for smaller businesses or one time service receivers. As such, the system closely resembles the recognized sponsorship possibilities under Dutch migration law.[83]

The conditions to obtain a licence for tier 2 and 5 sponsors apply in general. Without the sponsor fulfilling them, the GATS ICT transfer or the GATS contractual service supplier service provision cannot take place. Additionally, the migrant needs to fulfil the obligations that apply to the relevant sub-category of tier 2 and tier 5. Finally, the sponsor must comply with specific conditions relating to a tier or

ties relating to the Immigration, Asylum and Nationality Act, or for employing illegal immigrants. Relevant criminal records include offences under the Immigration or Border Acts and those listed in Appendix B.

77 See in general: Sponsor Guidance tier 2 and 5, section 3.

78 Sponsor Guidance tier 2 and 5, par 18.12.

79 Sponsor Guidance tier 2 and 5, Annex 3 and 4.

80 Sponsor Guidance tier 2 and 5, par 18.11.

81 Sponsor Guidance tier 2 and 5, par 18.13-18.19. The fees are listed on the UK visa sponsorship for employer's website: <https://www.gov.uk/> (last visited 1 October 2015).

82 Sponsor Guidance tier 2 and 5, par 10.6, see extensively the webpage: <https://www.gov.uk/employer-sponsorship-join-the-premium-customer-service-scheme> (last visited 1 October 2015).

83 Chapter 5, par 5.2.2.3.

sub-category. The specific obligations for the migrant and the sponsor will be described in this chapter for each category.

6.3 The UK GATS mode 4 commitments and implementation

The horizontal commitment relating to Mode 4 was inscribed together by the EU Member States. Though minor details vary, the basic outline of the UK commitment is similar to that described in the previous chapter. It contains the same categories of Mode 4 service suppliers. While the implementation differs, parallels with the Dutch implementation can be drawn. Initially, the UK GATS Mode 4 obligations were simply transposed into the Points-Based System with a single phrase indicating that applicants should fulfil the terms and conditions of the relevant international agreement.[84] This has improved significantly; March 2015, the Immigration Acts specify the conditions that apply to ICT, Contractual Service Suppliers, Independent Professionals and Business Visitors. These conditions mostly implement the UK GATS Mode 4 commitments, but not without flaws, as will be discussed below.[85] The policy guidelines and sponsor guidelines provide explanation and additional information, yet still refer to GATS service suppliers as those that have a contract to supply services in the UK 'as set out in the GATS'.[86] This paragraph will describe entry, residence rights and the right to provide a specific service from the perspective of the categories identified in the GATS chapter. The UK legal rules and policies should not contain any condition or obligation that is not in conformity with the international trade liberalization regime. An analysis will demonstrate that some of these national provisions are clearly in contrast with the GATS obligations; however, this clarity is the exception. Most problems identified below do not expressly run counter to GATS obligations, but they do infringe the method and the underlying rationale of the GATS. An explanatory remark accompanying the Points-Based System demonstrates this clear divide between the idea of GATS, trade liberalization and transparency and its translation into the national legal order of the UK:

> We are obliged to allow into the country to work a number of people as a result of a variety of international agreements.[87]

84 UK Home Office, Tier 5 (Temporary Worker) of the Points-Based System – Policy Guidance, version 12/2010, par 132; Seddon 2010, p 317-318. As noted during an interview held in 2011, there is insufficient information on GATS and other international commitments. 'The initial implementation is a catch-all and very passively drafted in the sense that if you meet all international commitments, then it is ok. This is very unhelpful as there is no information on the interpretation.' Interview UK Home Office (29 June 2011).

85 This chapter, par 6.3.8 and chapter 7, par 7.5.3.

86 Policy Guidance tier 5, par 136; Immigration Rules, par 245ZM to 245ZS.

87 Home Office 2006a, par 155.

This statement is not promising at all. It is more an apology in advance for being forced to allow migrants in, against the will of the UK government, hardly a helpful remark when implementing international obligations that were adopted based on reciprocity. Regarding the Mode 4 categories, the UK has made a division between intra-company transfers who should apply under tier 2 (skilled workers with a job offer) and contractual service suppliers who should apply under tier 5 (temporary workers).[88] Finally, in order to allow visits for the selling of services or the establishment of a commercial presence (Mode 3), business visitors must be allowed entry and temporary stay for these purposes.[89] As such, the actual conditions applying to the GATS service provider wishing to enter under these categories can be found in the Immigration Rules. Without the policy guidelines, it is hard to understand these rules, as various details not included in the Immigration Rules can be found in these guidelines.[90] The Immigration Rules require most categories of economic migrants falling within the PBS to obtain a sponsor. As such, for intra-company transfers, it is the UK branch of the corporation employing the ICT that needs to operate as the sponsor. For service providers, including those wishing to post their own workers, the party that needs to comply with the conditions for sponsors is the service receiver. The conditions for obtaining a sponsor licence as well as the continuing duties for sponsors are indicated in the Immigration Rules. As with the policy guidelines, various details and conditions are dealt with in sponsor guidelines, without which the rules are incomplete.

6.3.1 Tier 2 Intra-Company Transfers

In general, tier 2 has the purpose to fill vacancies on the UK labour market that cannot be fulfilled by settled workers.[91] The tier 2 sub-category Intra-Company Transfer allows for the transfer of employees of multi-national companies from one of its branches to a UK based branch. As an initial condition, this entry route requires the sending organization to have common ownership, or control over the UK branch, otherwise the sending would not be part of an intra-company transfer.[92] The tier 2 Intra-Company Transfers category has four sub-categories: Short Term staff, Long Term staff, Graduate Trainee and Skill Transfer.[93] As is apparent from the provided definitions, short and long term staff fit the basic aim of tier 2

88 As is also indicated in Policy Guidance tier 5, par 133. Moreover, the Immigration Rules specify that regarding Certificates of Sponsorship, the required points for entry under tier 5 cannot be based on the provisions under Mode 4 of the GATS relating to intra-corporate transferees, Immigration Rules Appendix A, par 112.

89 Immigration Rules, par 46G-46L; Business Visitors Guidance. As indicated, these rules will change on the 24th of April 2015.

90 Policy Guidance tier 2, par 21 and further; Policy Guidance tier 5, par 135 and further.

91 Policy Guidance tier 2, par 2.

92 Policy Guidance tier 2, par 2.

93 Immigration Rules, par 245G; Policy Guidance tier 2, par 2.

to fill vacancies on the UK labour market, whereas graduate trainees and skill transfers allow entry for training at the UK branch. For skill transfer the opposite holds also true, a specific employee of the multi-national who possesses skills and knowledge required by the UK branch may be transferred to the UK to fulfil the need of the UK branch. The GATS Mode 4 commitments relating to ICT fit within the staff category as well as the skill transfer category. As the EU Doha Round Mode 4 offer contains graduate trainees, this category will be described as well.[94]

Required points

Applicants under this category must obtain sufficient points regarding attributes and maintenance, however, intra-company transfers do not need points for English language skills.[95] For attributes this effectively means obtaining a Certificate of Sponsorship and receiving the appropriate amount of salary.[96] Complying with all conditions incorporated under the specific intra-company transfers sub-category in the PBS will lead to 50 points, 30 for the Certificate of Sponsorship and 20 for the appropriate salary. Consequently, all conditions must be met, including those applying to the sponsor.

Maintenance

For maintenance, a total of 10 points needs to be obtained. This entails demonstrating the availability of sufficient fund for support in the UK up to the first payment for employment.[97] For ICT sponsors with an A licence it is possible to certify maintenance for any tier 2 migrants, as well as for accompanying tier 2 dependant.[98] Doing so means that the sponsor will maintain the migrant up to the first month of employment in the UK, if this is required. Furthermore, the sponsor must instruct the migrant not to claim state benefits, or action will be taken against the sponsor. The benefit of certifying maintenance is that the migrant need not submit the required evidence.[99]

94 World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, horizontal Mode 4 commitment, available online: <www.wto.org>; WTO Council for Trade in Services, Communication from the European Communities and its Member States Conditional Revised Offer, 29 June 2005, TN/S/O/EEC/ Rev.1, horizontal Mode 4 commitment, available online: <www.wto.org>.

95 Policy Guidance tier 2, par 6, this is apparent from the actual rules by omission: Immigration Rules 245GB.

96 Immigration Rules Appendix A, par 73-73B; Policy Guidance tier 2, par 22-24.

97 Immigration Rules par 245GB(c) and Appendix C, par 4-5 (for the migrant) and Immigration Rules par 245GD(h) and Appendix E, par b (for dependants). Availability practically means personal savings of £945 for the migrant, as well as £630 pounds for each dependant. Note that these amounts apply in March 2015 and have gone up from £900 and £600 since December 2013, see UK Home Office, Tier 2 of the Points-Based System – Policy Guidance, version 12/2010, par 151 and 154.

98 Immigration Rules Appendix C, par 5(c), Sponsor Guidance tier 2 and 5, par 39.3.

99 Sponsor Guidance tier 2 and 5, par 39.8; see regarding these documents: Policy Guidance tier 2, par 162-167.

Attributes

Intra-company transfers are aimed towards the mobility of (highly-) skilled workers. This is apparent from the definitions provided with the EU GATS ICT commitments. Similarly, tier 2 is aimed at skilled workers and GATS ICT commitments were incorporated within this tier. ICT transfers generally require the occupation (not the transferee) to be at a bachelor level of education. For the creative sector the occupation must be at a higher education level.[100] Regarding prior employment obligations, the period of maximum leave and a cooling-off period during which the migrant may not apply again (ensuring the temporary nature of ICT entry), the following conditions apply to each of the four ICT sub-categories:[101]

Long-term staff
- Prior employment condition of one year;[102]
- The maximum leave under this category is five years and one month;[103]
- A cooling-off period of 12 months applies.[104]

Short-term staff
- Prior employment condition of one year;[105]
- The maximum leave under this category is 12 months;[106]
- A cooling-off period of 12 months applies.[107]

Graduate trainee
- Prior employment condition of three months;[108]
- The maximum leave under this category is 12 months;[109]
- Sponsors are limited to five migrants per financial year under this category;[110]
- A cooling-off period of 12 months applies.[111]

Skill transfer

100 See the diagram at: <http://ofqual.gov.uk/help-and-advice/comparing-qualifications/> (last visited 1 October 2015). See also the lists contained in: UK Home Office, UK Visas & Immigration, Codes of Practice for Skilled Workers Standard Occupational Classification (SOC) Codes, Version 04/14; Immigration Rules Appendix A, par 74B; Policy Guidance tier 2, par 23; Sponsor Guidance tier 2 and 5, par 24.7-24.10.

101 See also Policy Guidance tier 2, par 192 that specifies the duration of entry clearance and leave to remain for each of the four ICT sub-categories.

102 Immigration Rules Appendix A, par 74C; Policy Guidance tier 2, par 30; Sponsor Guidance tier 2 and 5, par 30.6.

103 Immigration Rules, par 245GC(B); Policy Guidance tier 2, par 24; Sponsor Guidance tier 2 and 5, par 30.9.

104 Policy Guidance tier 2, par 24; Sponsor Guidance tier 2 and 5, par 30.13 and par 39.27-39.33.

105 Immigration Rules Appendix A, par 74C; Policy Guidance tier 2, par 30; Sponsor Guidance tier 2 and 5, par 30.6.

106 Immigration Rules, par 245GC(B); Policy Guidance tier 2, par 24; Sponsor Guidance tier 2 and 5, par 30.14-30.15.

107 Policy Guidance tier 2, par 24; see also: Sponsor Guidance tier 2 and 5, par 30.16 and par 39.27-39.33.

108 Immigration Rules Appendix A, par 74D; Policy Guidance tier 2, par 38; Sponsor Guidance tier 2 and 5, par 30.19.

109 Immigration Rules, par 245GC(B); Policy Guidance tier 2, par 24; Sponsor Guidance tier 2 and 5, par 30.17.

110 Immigration Rules Appendix A, par 74D; Sponsor Guidance tier 2 and 5, par 30.20.

111 Policy Guidance tier 2, par 24; see also: Sponsor Guidance tier 2 and 5, par 30.21 and par 39.27-39.33.

- No prior employment condition (this is more liberal than GATS);[112]
- The maximum leave under thus category is 6 months;[113]
- This sub-category is aimed at the transfer of skills and knowledge within the multinational organisation, either to ensure development of the migrant, or to impart their specialist skills to the UK workforce. As such, there must be a specific need for the transfer and it must not be intended to fulfil (including through rotation of transferees) an existing position in a UK-based project;[114]
- A cooling-off period of 12 months applies.[115]

A minimum gross wage level including bonuses and allowances applies to all ICT categories. The minimum level of wages for intra-company transfers is set at a significantly higher level than tier 2 (general migrants).[116] Wages must be at least set at the level of the UK Codes of Practice for the specific job. These levels provide an indication of salaries for specific jobs in the UK that are based on an annual survey of hours and earnings.[117] Many indications provided in the Codes of Practice range from £20.000 for new entrants to £28.000 for experienced workers. However, since April 2011, the Points-Based System ensures a minimum wage level that must be paid, even if the level in the Code of Practice is set at a lower level. As indicated above, in March 2015 these are set at £24.500 annually for short-term ICT, skills transfer or for graduate trainees, and at £41.000 annually for long term ICT. Consequently, ICT transferees, in particular new entrants, who enter the UK based on the PBS are required to earn more than the average level of settled workers in the UK. This effect is slightly lessened by the requirement in the GATS Mode 4 ICT commitment that migrants must be employed at least one year previous to the transfer. As such, tier 2 ICTs relying on the GATS have, by definition, at least one year of working experience, and presumably a slightly raised salary.[118]

112 Policy Guidance tier 2, par 40; Sponsor Guidance tier 2 and 5, par 30.22.
113 Immigration Rules, par 245GC(B); Policy Guidance tier 2, par 24; Sponsor Guidance tier 2 and 5, par 30.22.
114 Immigration Rules Appendix A, par 74E; Policy Guidance tier 2, par 41; Sponsor Guidance tier 2 and 5, par 30.23-30.26.
115 Policy Guidance tier 2, par 24; see also: Sponsor Guidance tier 2 and 5, par 30.27 and par 39.27-39.33.
116 £20.500 for tier 2 general migrants compared to £24.500 for ICT Short Term Staff, Skill Transfer and Graduate Trainees and £41.000 for long term staff, Policy Guidance tier 2, par 44 and 77. A migrant's salary package must comply with these thresholds and it may not be reduced below these thresholds later, Policy Guidance tier 2, par 45-50; Sponsor Guidance tier 2 and 5, par 26.16 (note the exceptions contained in par 26.18 and 26.19).
117 Immigration Rules Appendix A, par 75 and 75C; Home Office, Codes of Practice for Skilled Workers Standard Occupational Classification (SOC) Codes, Version 04/14, p 5.
118 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment.

Required evidence

The Certificate of Sponsorship number is important as it demonstrates that the sponsor has a licence and indicates several of these conditions to be fulfilled.[119] However, several of the above-described conditions must be supported by additional evidence.[120] As such, evidence of the prior employment obligation must be provided.[121] Evidence consists of original payslips or alternatively personal bank statements or a building society pass book. A formal letter of the employer may be required as well.[122] Details concerning the verification of documents and extra checks are included in the Policy Guidelines.[123] If the migrant fulfils the maintenance requirement through the availability of personal savings, the migrant must demonstrate this by providing original evidence regarding saving or currency accounts or personal bank or building society statements.[124] Furthermore, the Home Office may request more evidence or an interview to check whether the migrant indeed will perform the role indicated on the Certificate of Sponsorship. In such cases, the migrant must demonstrate knowledge of the employment that he or she will perform, the sponsor, the method of recruitment, relevant experience required to perform the role and any other relevant information.[125]

6.3.2 Resident labour market test

For tier 2 (General) a resident labour market test applies.[126] This test entails that a vacancy must be filled by a settled UK worker, even if the settled worker is less skilled or experienced than a migrant worker. The test itself entails advertising for 28 calendar days in accordance with two of the prescribed methods. For most job offers, the employer must use Jobcentre Plus as one of the chosen options.[127] The other optional methods are: national newspapers or professional journals, an annual recruitment programme where various employers provide presentations to potential employees (a so-called Milkround), recruitment campaigns, recruitment agencies and head-hunters or the internet.[128] The advertising itself needs to fulfil

119 See for example: Policy Guidance tier 2, par 53. Various details concerning the required points for attributes, the Certificate of Sponsorship and evidence to be provided are specified in the Immigration Rules Appendix A, for Intra-Company Transfers see: par 73-75E.
120 See the Policy Guidance tier 2, par 179-182 which contains general requirements relating to evidence such as providing original documents and providing translations if documents are not provided in English or Welsh.
121 Immigration Rules Appendix A, par 74(c)(a)(iii) and 74C-SD(a); Policy Guidance tier 2, par 53.
122 Policy Guidance tier 2, par 53.
123 Policy Guidance tier 2, Annex B.
124 Policy Guidance tier 2, par 162-167.
125 Policy Guidance tier 2, par 111.
126 Policy Guidance tier 2, par 65 and 86; Sponsor Guidance tier 2 and 5, par 28.
127 Sponsor Guidance tier 2 and 5, par 28.25 and 28.31-28.42; information regarding Jobcentre Plus can be found at: <https:www.gov.uk/advertise-job> (last visited 1 October 2015).
128 Sponsor Guidance tier 2 and 5, par 28.31-28.42.

several conditions to ensure that candidates are aware of required skills, their responsibilities and the salary involved.[129] For the tier 2 ICT category, this test does not apply. GATS liberalization notably aims towards the abolition of economic needs tests, also known as resident labour market tests, the value of which is evidenced from the description of this test as just provided.

6.3.3 Tier 2 sponsors

As indicated, besides the conditions that apply to the transferee, their sponsors need to fulfil certain criteria as well. From a GATS Mode 4 perspective, these criteria therefore need to be met. Sponsors of tier 2 migrants must demonstrate a direct link by 'common ownership or control' with the overseas entity employing the proposed migrant. Circumstances that demonstrate this direct link are set out in the Sponsor Guidance, and simple common ownership of shares by an individual is not enough.[130] Furthermore, ICT sponsors are required to pay migrants via their bank account or through pre-paid cards (such as Forex) and evidence of payment through pre-paid cards must be available.[131] This condition prevents circumvention of wage requirements. A thorny issue of the PBS is that the migrant is dependent on the sponsor regarding the legality of residence and employment.[132] If the sponsor fails to comply with its duties, its licence may be revoked independent of the migrants actions. As specifically indicated in the Policy Guidance:

> A Certificate of Sponsorship can be withdrawn or cancelled at any time by either the Home Office or your sponsor. Where your applications relies on a Certificate of Sponsorship that has been either withdrawn or cancelled, your application will be refused.[133]

6.3.4 Tier 2 quota

The tier 2 (ICT) category is not subject to quota, in part due to international obligations preventing the imposing of a quota.[134] Historically the ICT rules were already in place at a level more generous than the UK GATS commitments. However, the conditions for ICT entry were tightened as the minimum salary for those coming over for longer than 12 years was raised to £41.000 and the occupation should be at

129 Sponsor Guidance tier 2 and 5, par 28.18. Specific details regarding the Resident Labour Market Test are included in the Immigration Rules Appendix A, par 78-78D.
130 Sponsor Guidance tier 2 and 5, par 4.2; see also: Seddon 2010, p 89.
131 Sponsor Guidance tier 2 and 5, par 24.13.
132 Interview Trades Union Congress (TUC) (21 June 2011).
133 Policy Guidance tier 2, par 175.
134 This chapter, par 6.3.8.

least at bachelor (or higher education for the creative sector) level.[135] One of the reasons for not applying a quota to tier 2 (ICT) is that the government was worried about its international commitments, in particular under the GATS. Other motivations can be found in the recognition that the ICT category attracts investment into the UK, as well as the influencing of government policy by private sector lobbying.[136]

6.3.5 Tier 5 contractual service suppliers and independent professionals

From the outset, it is necessary to address possible confusion created by the tier 5 policy guidelines. The Immigration Rules identify two different categories of temporary workers relying on an international agreement, contractual service suppliers and independent professionals. The first category is part of the UK GATS Mode 4 commitments. No GATS commitment was made regarding Independent Professionals, though this category is part of the EU's revised Doha Round offer.[137] The independent professional category is part of other agreements signed by the EU, including the EU – CARIFORUM economic partnership agreement.[138]

> [A] contractual service supplier (...)is employed by a company based outside the European Union (EU) that has a contract to supply services to someone in the UK as set out in the GATS or a similar trade agreement; or
>
> [A]n independent professional (...) is self-employed, with no commercial presence inside the EU and has a contract to supply services to someone in the UK as set out in the EU - CARIFORUM economic partnership agreement or a similar trade agreement.[139]

Consequently, it might seem as if contractual service supplier is the term reserved for GATS service suppliers, and similar agreements, whereas the term independent professionals is reserved for service suppliers falling within the scope of the EU – CARIFORUM, and similar trade agreements. This is not the case, as both categories of service suppliers clearly are part of both (types) of international trade agreements, though the EU GATS Mode 4 commitment does not include inde-

135 Policy Guidance tier 2, par 23; Sponsor Guidance tier 2 and 5, par 24.7-24.10; as indicated, the minimum level of pay is now set at £41.000, see also Seddon 2010, p 58.

136 Interview UK Home Office (29 June 2011).

137 WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.

138 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part OJ (2008) L289/I/3. Note that the EU-Chile Free Trade Agreement and the EU-Andean Free Trade Agreement are listed as well, but only in the table providing the maximum period for a tier 5 (international agreement) category in the tier 5 Policy Guidance, par 91 and in the Sponsor Guidance tier 2 and 5 in par 38.8 (indicating that the UK has undergone international commitments) and par 38.17 (concerning the condition that the migrant is employed by a business outside the EU). It is unclear why other details, which are included for the GATS and the CARIFORUM FTA are missing.

139 Policy Guidance tier 5, par 136.

pendent professional commitments (yet).[140] This reading is confirmed by the list of definitions provided in the Immigration Rules.[141] Contractual service suppliers and independent professionals are defined in accordance with the relevant provisions of one of the agreements specified in paragraph 111(f)(i) of Appendix A of the Immigration rules. That paragraph provides that the Certificate of Sponsorship issued under the International Agreement sub-category for a contractual service supplier or independent professional is only valid if the work is pursuant 'to a contract to supply services to the sponsor in the United Kingdom by an overseas undertaking established on the territory of a party to the General Agreement on Trade in Services or a similar trade agreement which has been concluded between the EU and another party or parties and which is in force (...)'. As such, paragraph 111(f)(i) of Appendix A refers to the GATS and similar agreements, of which the EU – CARIFORUM agreement is an example. Considering the complicated subject-matter, as well as the various layers of rules and guidelines implementing the GATS obligations, the language in the tier 5 (International Agreement) policy guidelines needs to be adjusted.

GATS contractual service suppliers and independent professionals

Contractual service suppliers can be seen as the equivalent of posted workers under EU law.[142] Within the UK this EU concept is also known as the 'Vander Elst' route, leading to a Vander Elst visa. The UK has not undertaken any GATS commitment regarding independent professionals. However, the Immigration Rules can easily accommodate the implementation of future commitments for this category. This approach is logical considering the fact that the EU's revised Doha Round offer contains a Mode 4 commitment regarding this category. Moreover, as these rules are drafted to include 'similar agreements' such as EU FTAs which often provide for wider and deeper liberalization than the GATS commitments (GATS+ commitments), the rules serve to implement commitments for such FTAs regarding independent professionals. Therefore, this paragraph will describe the rues applicable to independent professionals as well.

For both tier 5 sub-categories the following conditions apply. Applicants must obtain sufficient points for attributes and maintenance. As with the intra-company transfers category, there is no need to score points for English language skills.[143] The points and conditions for the maintenance requirement are similar to the in-

140 Chapter 2, par 2.4.2.
141 Immigration Rules, par 6.
142 This term is derived from case C-43/93 *Raymond Vander Elst v Office des Migrations Internationales* ECLI:EU:C:1994:310, which constitutes the follow-up of case C-113/89 *Rush Portuguesa Lda mot. Office national d'immigration* ECLI:EU:C:1990:142; chapter 3, par 3.4.2.
143 Policy Guidance tier 5, par 12, see also par 96-101.

tra-company transfers category.[144] The migrant has to demonstrate sufficient funds in order to reside in the UK during the first month of employment. While it is possible for tier 5 sponsors with a licence rated A to certify maintenance for the tier 5 migrant, this is not possible for dependents of the migrant.[145] A tier 5 (Temporary Worker) Certificate of Sponsorship relating to the sub-category must be obtained. In points based terms this means that 30 points are needed on a table that indicates one possibility, the CoS. No alternatives are available.[146] The following condition must be met to obtain a CoS:[147]

- the work must be pursuant to a contract to supply services to the sponsor in the UK by an undertaking established on the territory of a party to the GATS without that undertaking having commercial presence in the EU;
- the sponsor will be the final consumer of the services provided under that contract;
- the applicant is a national of the country in which the overseas undertaking is established;
- the service must fall within the scope of the sectors specified in the relevant commitments;[148]
- the sponsor has, through an open tendering procedure or other procedure which guarantees the bona fide character of the contract, awarded a services contract for a period not exceeding 12 months to the applicant's employer;
- leave is granted for a maximum period of six months in any twelve-month period. Thus, a cooling-off period of six months applies.[149]

Several conditions apply specifically to either contractual service suppliers or to independent professionals:[150]

- where the applicant is a contractual service suppliers, he possesses:
  - a university degree or a technical qualification demonstrating knowledge of an equivalent level, and provides the original certificate of that qualification (...);
  - where they are required by any relevant law, regulations or requirements in force in the United Kingdom in order to exercise the activity in question, professional qualifications;
  - 3 years' professional experience in the sector concerned (...).

144 This chapter, par 6.3.1.
145 Sponsor Guidance tier 2 and 5, par 39.3; this chapter, par 6.2.2.4. It seems unlikely that a tier 5 sponsor wishing to occasionally utilise a contractual service supplier or an independent professional will (be able to) pay the fee in order to obtain an SME+ licence.
146 Policy Guidance tier 5, par 12 and 96-101. See also: Immigration Rules, Appendix A par 105-107.
147 Immigration Rules, Appendix A, par 111(f)(i to v), see also Policy Guidance tier 5, par 136.
148 The service sectors are listed in the Sponsor Guidance tier 2 and 5 Appendix F.
149 Sponsor Guidance tier 2 and 5, par 38.14.
150 Immigration Rules, Appendix A, par 111(f)(vi and vii), see also Policy Guidance tier 5, par 136.

- where the applicant is a contractual service suppliers, he has been employed, and provides (...) specified documents (...) to show that he has been employed, by the service supplier for a period of at least one year immediately prior to the date of application.

In relation to the required professional experience and the required qualifications for contractual service suppliers, several specific conditions were adopted. Most of these correlate with those adopted in the UK's vertical GATS Mode 4 commitments relating to these specific service sectors:[151]

- in the case of advertising and translation services, relevant qualifications and 3 years of professional experience, and provides the original certificate of those qualifications;
- in the case of management consulting services and services related to management consulting (managers and senior consultants), a university degree and 3 years professional experience, and provides the original certificate of that qualification;
- in the case of technical testing and analysis services, a university degree or technical qualifications demonstrating technical knowledge and 3 years professional experience, and provides the original certificate of that qualification;
- in the case of fashion model services and entertainment services other than audiovisual services, 3 years' relevant experience;
- in the case of chef de cuisine services, an advanced technical qualification and 6 years' relevant experience at the level of chef de cuisine, and provides the original certificate of that qualification.[152]

Specific requirements for independent professionals are:[153]

- where the applicant is an independent professional, he possesses:
- a university degree or a technical qualification demonstrating knowledge of an equivalent level, and provide the original certificate of that qualification;
- where they are required by any relevant law, regulations or requirements in force in the United Kingdom in order to exercise the activity in question, professional qualifications;
- at least six years professional experience in the sector concerned.

The conditions are similar to the EU GATS Mode 4 revised Doha Round offer.[154]

151 Immigration Rules Appendix A, par 111(f)(vi)(4), see also Policy Guidance tier 5, par 136.

152 Immigration Rules Appendix A, par 111(f)(vi)(4), see also Policy Guidance tier 5, par 136. Fashion model services and chef de cuisine services are not part of the UK GATS commitments. Consequently, they must be part of one of the other EU's FTAs, see: Immigration Rules, Appendix A, par 111(f)(i).

153 Immigration Rules Appendix A, par 111(f)(viii), see also Policy Guidance tier 5, par 136.

154 WTO (CTS) 2005 (EU Revised Offer), horizontal Mode 4 commitment.

Required evidence

As with the ICT category, the above-described conditions must be supported by additional evidence. Contractual service suppliers must fulfil a prior employment obligation, evidence of which is similar to that required for the ICT category. Evidence may consist of original payslips or alternatively personal bank statements or a building society pass book. A formal letter of the employer may be required as well.[155] Details concerning the verification of documents and extra checks are included in the policy guidelines.[156] If the migrant fulfils the maintenance requirement through the availability of personal savings, the migrant must demonstrate this by providing original evidence regarding saving or currency accounts or personal bank or building society statements.[157] As explicitly stated, doubts and suspicions may lead to extra checks, which in turn may cause delays in the decision time.[158] While in theory there is nothing against such methods, legal systems require verification, in practice much depends on the cause for such suspicions. A practice where service providers from certain countries would more often be targeted will infringe GATS Article VI, which requires transparent and objective procedures. Similar to the genuineness test applying to the ICT category, for tier 5 migrants the Genuine Tier 5 Migrant Test applies since 1 October 2013. The idea is to tackle abuse of the route by requesting more evidence or an interview to check whether the migrant indeed will perform the role indicated on the Certificate of Sponsorship. The migrant must demonstrate knowledge of the employment that he or she will perform, the sponsor, the method of recruitment, relevant experience required to perform the role and any other relevant information.[159]

6.3.6 Tier 5 sponsors contractual service suppliers and independent professionals

In order to obtain a CoS, the contractual service supplier or the independent professional needs a sponsor. The sponsor in turn requires a sponsor licence in order to assign a CoS to the migrant.[160] The applicant for the sponsor licence must demonstrate that the job or employment is covered by the related terms of the international agreement. These conditions are similar to those identified above applying to the migrant.[161] While included in the sponsor guidance, this needs to be

155 Immigration Rules Appendix A, par 111(SD)(a)(iii) and 74C-SD(a); Policy Guidance tier 5, par 159.
156 Policy Guidance tier 5, par 14-18 (documents) and 19-33 (verification and checks).
157 Policy Guidance tier 5, par 151.
158 Policy Guidance tier 5, par 29-31.
159 Policy Guidance tier 5, par 37.
160 Immigration Rules Appendix A, par 109.
161 Sponsor Guidance tier 2 and 5, par 38.

demonstrated when a sponsor wants to assign a CoS to a GATS migrant. As the application procedure for a sponsor licence can take 2 to 3 months this may cause significant delays relating to the first time a CoS is assigned, which is most troublesome in relation to one-time service provision.

The sponsor is required to indicate the number of required CoS based on the nature and duration of the service contract. Assigned CoS must relate to that contract; when a new service contract is obtained a new procedure to assign CoS is required. Failing to do so will lead to the revoking of the sponsor licence.[162] The sponsor guarantees responsibility regarding the conditions that apply to the migrant. Moreover, the sponsor has responsibility regarding the migrant's conditions of the permission to stay and the requirement to leave the UK after expiry of that permission.[163] The sponsor guidance explicitly states that employment undertaken under this category must comply with all relevant UK and European employment legislation.[164] However, while ICT concerns employees of multinationals, tier 5 GATS migrants clearly are service providers and not employees. There is a general problem with the treatment of service provision under a regulatory system that applies to employment. As listed above, the GATS Mode 4 conditions relating to the open tendering procedure and the condition that the service receiver (the sponsor) must be the final user. These conditions are directed at the service receiver, which in the UK is the sponsor.[165] The final user criterion excludes sub-contracting, providing temporary labour services and hiring-out of personnel.

6.3.7 Business visitors

The GATS conditions for BV, as defined in the GATS commitments, are that representatives of a service supplier must be provided with the right of temporary stay in order to negotiate the sale of services or to enter into agreements to sell services. Direct sales to the general public are not allowed and representatives may not provide services themselves. In order to set up a commercial presence, senior employees (the definition of which is similar to that of ICT relating to directors and managers) of juridical persons are allowed temporary residence to facilitate this task. Again, direct sales are prohibited. Furthermore, this category only applies if the juridical person does not have a commercial presence in the specific EU Member State. The BV category is not part of the PBS; instead it is included in the Immigration Rules for visitors. Besides the general rules for visitors, they need to comply with specific conditions relating to BV.[166] However, this regime will change as a

162 Sponsor Guidance tier 2 and 5, par 38.18-38.19.
163 Sponsor Guidance tier 2 and 5, par 17.19 and 38.17.
164 Sponsor Guidance tier 2 and 5, par 38.3.
165 Sponsor Guidance tier 2 and 5, par 38.12.
166 Immigration Rules, par 46G(i).

consequence of new rules. The new rules will apply to visitors in general, who may visit for the purpose of a business meeting.[167] Depending on the nationality of the visitor, a visa is required.[168] Leave to remain is limited to a period not exceeding six months.[169] Conditions that apply to this category are: no recourse to the public funds, no following of a study and no employment.[170] An application by a visitor will also be refused on the above-described general refusal grounds.[171] Furthermore, the visitors leave may be curtailed on grounds such as being a persistent offender showing a particular disregard for the law, or the undesirability to permit a visitor to remain due to the applicant's conduct, character or associations.[172] Sponsorship does not apply, but the visitor needs a written declaration from a third party that will be responsible for the visitors maintenance and accommodation during the visit.[173]

In addition to these general grounds, visitors must genuinely seek entry as a visitor, thus in the case of the here described category, the purpose of visit must be for business.[174] This includes the intention to leave the UK at the end of the visit and it excludes the intention to live in the UK for extended periods through frequent or successive visits.[175] Several activities are prohibited to visitors. This includes (self-) employment, direct selling to the public, providing goods and services or receiving payment for activities in general.[176] Visitors may *inter alia* attend meetings, give speeches and negotiate and sign deals and contracts. Intra-corporate activities include providing consultations, training and the sharing of skills and knowledge.[177] This category partly implements the GATS commitment relating to business visitors. As described, there are two types of BV inscribed in the horizontal EU mode 4 commitment, representatives of a service supplier negotiating the sale of services and directors of juridical persons wishing to set up a commercial presence. As indicated, a limitative range of purposes is listed. However, the purpose of setting up a commercial presence is not listed.

167 Statement of Changes in Immigration Rules, HC 1025, 26 February 2015, Draft Visitor Guidance (E) v.final 14 April 2014; draft Visitor Rules v.final, 6 April 2014.
168 Draft Visitor Rules, par V1.3, V1.4 and Appendix 2.
169 Draft Visitor Rules, par V1.6, note that this period applies to the general category of visitors, which includes the business visitor.
170 Draft Visitor Rules, par V1.16.
171 This chapter, par 6.2.2.1; Draft Visitor Rules, par V3.2-V3.13.
172 Draft Visitor Rules, par V3.23-3.28.
173 Draft Visitor Rules, par V3.16; the visitor cannot rely on work for maintenance, as that is a prohibited activity, see par V4.10 and V4.11.
174 Draft Visitor Rules, par V4.6.
175 Draft Visitor Rules, par V4.7.
176 Draft Visitor Rules, par V4.12 and V4.13.
177 Draft Visitor Rules, par V4.17 and V4.18 and Appendix 3, par V.APP3.5-V.APP3.8.

6.3.8 Comparison with the GATS commitments

As with the ICT category, the above-described conditions must be supported by additional evidence.

As explicitly stated, doubts and suspicions may lead to extra checks, which in turn may cause delays in the decision time.[178]

While in theory there is nothing against such methods, in practice much depends on the cause for such suspicions. A practice where service providers from certain countries would more often be targeted will infringe GATS Article VI, which requires transparent and objective procedures. Similar to the Genuineness Test applying to the ICT category, for tier 5 migrants the Genuine Tier 5 Migrant Test applies since 1 October 2013. The idea is to tackle abuse of the route by requesting more evidence or an interview to check whether the migrant indeed will perform the role indicated on the Certificate of Sponsorship. The migrant must demonstrate knowledge of the employment that he or she will perform, the sponsor, the method of recruitment, relevant experience required to perform the role and any other relevant information.[179]

The above described regime mostly incorporates the GATS Mode 4 commitments undertaken by the UK. Regarding some conditions, the national rules are more liberal than the GATS commitment. Firstly, the maximum duration of stay defined in the EU GATS commitment is set at a maximum of three months per twelve months. The UK regime is set at a maximum of six months per twelve months. Second, the vertical commitments relating to advertising and translation services, management consulting services and technical testing and analysis services the vertical commitments contain an additional restriction: 'compliance with an economic needs test is required.'[180] Thus, this restriction is not implemented in the PBS of the UK. Naturally, these discrepancies are unproblematic as the GATS sets the minimum level for national law.

Various of the conditions applying to GATS Mode 4 movements are unproblematic. Entry clearance in the form of visa serves as a prime example as that is explicitly allowed on the basis of the GATS Annex MNP. Another example relates to evidence requirements. Although the GATS commitments adopted by the UK do not refer to specific evidence indicating that the contractual service supplier was employed at least a year prior to the date of application, the UK requires one form of evidence out of four provided options. These options are payslips, either original or authenticated by a senior official, personal bank or building society statements or a building society pass book. Various details need to be visible concerning the

178 Policy Guidance tier 5, par 29-31.
179 Policy Guidance tier 5, par 37.
180 WTO (CTS) 2006 (EU Consolidated GATS Schedule), vertical commitments. The requirement of an economic needs test for the UK can be found under the Mode 4 part of each of these service sectors.

last two options, such as the applicants name, dates of statements and official stamps.[181] As to the validity of these evidence requirements from a GATS perspective, such conditions are unproblematic as long as they fulfil the procedural rules contained in Article VI GATS relating to the administering of GATS applications.[182] The UK provides four different options to provide evidence, which seems reasonable.

Two conditions are more clearly contrary to the GATS. Firstly, the PBS requires migrants entering the UK under the contractual service suppliers and the independent professsional sub-category to be a national of the home country. This condition is not incorporated in the EU commitment.[183] As described, the interaction of the GATS definition of Mode 4 with the Annex MNP is not entirely clear. I agree with Bast that it is logical to read the Annex MNP together with the definition provided in Article I:2(d) of the GATS. Thus Mode 4 is defined as the supply of a service 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member', while 'the natural persons are either service suppliers or employed by a service supplier, in respect of the supply of a service'.[184] Non-member nationals are excluded by this definition, with the exception of those that have the right to permanent residence in a member state under the conditions provided in article XXVIII(k) GATS.[185] However, this does not mean that nationals of a member, residing on the territory of another member are also excluded. Yet, the PBS indicates that the migrant must be a national of the country in which the sending business or the self-employed person is established.[186] This would mean that a Brazilian national employed by a company in India cannot be sent to the UK as a posted worker to provide a particular service for that company. Disregarding the fact this is contrary the GATS Most-Favoured-Nation obligation and rather outdated from a perspective of globalization, it is simply not part of the commitments. Therefore, the condition that the migrant has to be a national of the home member state is contrary to the UK's GATS Mode 4 commitments and needs to be abolished. Secondly, regarding business visitors, the purpose of setting up a commercial presence is not listed. While this may be derived from the activities that are allowed, it would be preferable to provide a clear indication that BV may visit the UK with the purpose of creating a commercial presence.

181 Immigration Acts Appendix A, par 111(SD).

182 Chapter 2, par 2.5.1.3.

183 Immigration Acts Appendix A, par 111(f)(v), see also Policy Guidance tier 5, par 134.

184 Article 1:2(d) GATS, Annex MNP, par 1; GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, par 1; J Bast 'Annex on Movement of Natural Persons Supplying Services Under the Agreement' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008), p 583; chapter 2, par 2.4.2.

185 Bast 2008b, p 580; Article XXVIII(k) GATS provides the condition that permanent residents should substantially enjoy equal treatment as nationals in respect of measures affecting trade in services.

186 Sponsor Guidance tier 2 and 5, par 38.10.

However, several conditions are not clearly in conformity with, or contrary to the GATS. The EU commitment contains a blanket reference indicating that all 'other requirements of [Union] and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements'.[187] As will be discussed in the concluding chapter, the legal nature of this condition will greatly influence the legality of new conditions introduced since the entry into force of the Uruguay Round Mode 4 commitments in 1996. Additionally, the Annex MNP of the GATS specifically allows Members to 'regulate the entry of natural persons into, or their temporary stay in, its territory including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair' commitments.[188] Finally, the GATS provides derogation grounds, of which Article XIV may be of relevance to certain conditions imposed by UK law. As an example relevant to certain entry conditions (f.i. relating to prior imprisonment) identified in this chapter, public moral or maintaining public order may be invoked to protect 'a genuine and sufficiently serious threat posed to one of the fundamental interests of society.'[189] Moreover, Article XIV measures may not form unjustifiable discrimination, arbitrary discrimination or disguised restriction on trade.[190] Considering the conditions listed above, Article XIV*bis* will not provide a derogation ground, as none of these conditions relate to the UK's security interests. Moreover, some grounds are decidedly vague such as being a persistent offender showing a particular disregard for the law, or the undesirability to permit a visitor to remain due to the applicant's conduct, character or associations.

A difficult issue with the requirement of a sponsor for GATS migrants is that the sponsor is not always an employer. Self-employed service providers obtaining a contract in the UK are not covered by an employment relationship. However, the PBS requires that GATS migrants are sponsored, which requires the contractor to act as sponsor.[191] The sponsor guidance does address this issue by stating the following:

> We recognize that under Tier 5 the sponsor may not always be the employer. In some circumstances, a migrant may meet all of the Tier 5 criteria where there is no direct employer/ employee relationship. Even though an employer/employee relationship may not exist, there must be a sponsor who is able and willing to take responsibility for them and meet all of the duties as-

187 WTO (CTS) 2006 (EU Consolidated GATS Schedule), horizontal Mode 4 commitment, footnote 6 and 9.
188 GATS Annex MNP.
189 Article XIV(a) GATS.
190 Chapter 2, par 2.5.3.1.
191 Sponsor Guidance tier 2 and 5, par 4.35.

> sociated with being their sponsor. If you are taking on this role, you will be responsible for the migrants you sponsor, even if you are not their employer.[192]

Furthermore, the guidance indicates that where a migrant is not a direct employee, the authorities will monitor the situation especially closely to ensure that the sponsor is fulfilling all of its duties, threatening potential sponsors with action if these duties are not upheld.[193] It is questionable whether the concept of sponsorship is in line with the UK Mode 4 commitments. Nothing in those commitments indicates the prerogative to set this condition and to the author sponsorship must be seen as additional limitations. The withdrawal of a CoS because sponsor fails duties unrelated to the service contract itself seems problematic in that regard. A counter argument may be provided based on the blanket reference.

Finally, besides these specific issues, some general comments are warranted. Considering how complicated the GATS legal order is, simply adopting the text is hardly facilitating potential service suppliers. Initially, the UK GATS Mode 4 obligations relating to contractual service suppliers and independent professionals were simply transposed into the PBS by indicating that applicants have to 'be engaged in work that meets the terms and conditions of the relevant international agreement'.[194] This has improved, commencing with the 2013 version, tier 5 policy guidance contains copies of the UK Mode 4 commitments concerning contractual service suppliers and independent professionals. However, the guidance still refers to 'a contract to supply services (...) in the United Kingdom as set out in the GATS or a similar trade agreement'.[195] These complicated questions will be analysed in parallel with the identified problematic issues under Dutch law in the concluding chapter to this work.[196]

6.4 Implementation of EU obligations in UK law and practice

This paragraph will discuss the implementation of entry, residence and market access rights as provided under EU law to several specific categories of persons. As with the previous chapters, the Acts and policies applying to EEA nationals, posted workers, transition citizens and Turkish nationals will be addressed insofar as they derive rights from the EU freedom to provide services. The conformity of these rules with EU obligations will be analysed.

192 Sponsor Guidance tier 2 and 5, par 33.8.
193 Sponsor Guidance tier 2 and 5, par 33.10.
194 Seddon 2010, p 317-318.
195 Policy Guidance tier 5, par 136.
196 Chapter 5, par 5.5 and chapter 7, par 7.5.3.

6.4.1 Introduction

EU nationals and several categories of third-country nationals may rely on EU law when providing services within the territory of the UK. Following the structure set out in chapter 3 and 5, the residence and market access rights of the categories of EU, EEA and Swiss nationals will be discussed simultaneously, as the EEA Agreement ensures the homogeneity of the rules relating to the internal market.[197] This is reflected in UK law as the main implementing act, the EEA Regulations 2006, simply refers to EEA nationals without specification. EEA national is defined as a national of an EEA State, which is defined in turn as the EU Member States, the EFTA member states (Norway, Iceland and Liechtenstein) and Switzerland. As such, these nationals are treated as a single group enjoying similar rights.[198] During a transition period, the core of rights provided to EEA nationals based on the internal market may be limited in relation to the right to work for accession citizens. The UK availed itself of this possibility in relation to Croatian nationals. The UK may impose this restriction until July 2020.[199] Posted workers enjoy derived movement rights from their employers, a type of movement that is referred to in the UK as the Vander Elst visa, or entry route. The related Posted Workers Directive was not transposed by a single Act, instead various Acts were amended to also cover posted workers. Finally, due to the standstill obligation of the EEC-Turkey association agreement, UK legislation applying to Turkish nationals is based on the legislation as it stood in 1973.

6.4.2 EU citizens, EEA nationals and family members

Entry rights are based directly on EU law, and the UK Immigration Act 1988 provides that leave to enter or remain is not required if a person has entry or residence rights by virtue of an enforceable Union right.[200] Clayton indicates that this in practice means that EU citizens are normally waved through at UK entry points after presenting proof of the right to travel.[201] This is in conformity with movement rights provided by EU law, as codified in Directive 2004/38. The EEA Regulations 2006 implement Directive 2004/38/EC, providing rights of entry and residence for EEA nationals and their family members in accordance with the definitions and conditions of EU law. A residence permit is not required.[202] As in Dutch legis-

197 Chapter 3, par 3.4.1.
198 EEA Regulations 2006, Article 2 definition EEA national and EEA State.
199 Chapter 5, par 5.4.4.
200 UK Immigration Act 1988, section 7, par 1.
201 Clayton 2014, p 103.
202 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ (2004) L158/77; EEA Regulations 2006, see for example Article 4(b) which indicates that the definition of a self-employed person is that provided in Article 43 EC (now Article 49 TFEU). Article 11 indicates that entry is →

lation, UK law explicitly refers to the definitions provided by EU law, which ensures the supremacy of EU law.[203] Appeals against decisions made under the European provisions are made to the same appellate bodies as other UK immigration appeals.[204]

6.4.3 Posted workers, derived mobility rights from EU service providers

The application of a variety of existing UK measures was extended in order to include posted workers, whereby the definition of such workers is connected to the definition in the Posted Workers Directive itself.[205] As such, the material scope of the directive, the minimum labour conditions, apply to posted workers on the basis of *inter alia* the Working Time Regulations 1998 and the National Minimum Wage Act and Regulations.[206] As concluded by Novitz, the Acts that apply to posted workers are in excess of the conditions listed in Article 3 of the directive. As is clear from ECJ case law, these conditions may not be imposed on (the employers of) posted workers.[207] Besides the minimum labour conditions that may be imposed, the PWD was implemented in relation to entry and residence conditions through an amendment of the Immigration (European Economic Area) Regulations 2000.[208] The Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002 amend the EEA Regulations so that they apply to Swiss nationals, as if they were EEA nationals.[209] However, and without any reflection of this in the name of the amending Regulation, the EEA Regulations also apply to posted workers.[210] The EEA Regulations 2000 were replaced by the EEA Regulations 2006, but instead of a codified version in which the definition of a posted worker, and the application of the Regulation to such workers was incorporated, the UK legislator opted for a confusing 'saving' of the 2000 Regulations.[211] Consequently, the EEA Regulations 2000 and the Swiss Free Movement of Persons Regulations 2002 were revoked, but not insofar as they apply the 2000 Regulations to posted workers.

This means that in order to understand this regime, one needs to have the revoked EEA Regulations 2000, the Swiss Free Movement of Persons Regulations 2002 to realize that these Regulations also apply to posted workers and finally, the

only dependent on a valid national identity card or a passport issued by an EEA State. See also: Clayton 2014, p 102-103.

203 Chapter 5, par 5.4.2.

204 EEA Regulations 2006, part 6; Clayton 2014, p 102.

205 T Novitz 'UK Implementation of the Posted Workers Directive 96/71' (2010) 22 Formula Working Paper, p 6-7, available online: <http://www.jus.uio.no/ifp/english/research/projects/freemov/publications/papers> (last visited 1 October 2015).

206 See for a complete overview: Novitz 2010, p 7.

207 Chapter 3, par 3.4.2.

208 The Immigration (European Economic Area) Regulations 2000, SI 2000/2326.

209 The Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002, SI 2002/1241, Article 2(1).

210 Swiss Free Movement of Persons Regulations 2002, Article 2(2).

211 EEA Regulations 2006, part 2.

EEA Regulations 2006 savings provisions to understand that this regime exists in the first place, as the 2006 Regulations do not mention posted workers. This is probably why Novitz mentions that there is no specific time limit on the posting of workers in the UK.[212] In fact, the Swiss Free Movement of Persons Regulations 2002 indicates that a posted worker authorization may not be provided if the posted worker 'has not already been authorized to enter and reside in the United Kingdom under this regulation for 90 days or more in that calendar year'. Moreover, such authorizations allow entry and residence in the UK for at least 90 days in that calendar year.[213] An end time is not specified, but EU law provides that posted workers have residence rights for the duration of the service contract of their employer.[214]

The minimum wage in the UK is laid down in law, however, collective agreements incorporating a higher wage level in certain sectors are not declared universally applicable.[215] Consequently, the UK has a similar system to Sweden, which led to the *Viking* and *Laval* disputes.[216] Moreover, the UK has not used the option provided in the Posted Workers Directive to either declare collective agreements generally applicable to all similar undertakings in a geographical area. The same holds true for the option to declare collective agreements concluded by the most representative employers and labour organizations at national level generally applicable.[217] As is clear from the *Essent* judgment, the derived rights of posted workers include third-country nationals hired-out by their employer in order to perform work in the UK may not be restricted, except through proportional information conditions relating to the legality of the posting. As such, this category should be treated similarly to the posted worker executing a service contract on the UK territory category.

6.4.4 EU citizens facing temporary restrictions from the free movement of workers

During a transition period, the core of rights provided to EEA nationals based on the internal market may be limited in relation to the right to work for accession cit-

212 Novitz 2010, p 8-9. In Ryan's note concerning the Accession (Immigration and Worker Authorisation) Regulations 2006, this structure implementing the entry and residence rights of Posted Workers is not mentioned either, despite the close relationship between these issues: B Ryan 'The Accession (Immigration and Worker Authorisation) Regulations 2006' (2008) 37:1 *Industrial Law Journal*, p 81.

213 Swiss Free Movement of Persons Regulations 2002, Article 7 (which inserts Article 13A into the EEA Regulations 2000). See also Article 14 (which inserts Article 20A into the EEA Regulations 2000).

214 Chapter 3, par 3.4.2. See also Novitz 2010, p 8-9 who indicates that under EU law there are indications that the line between temporary and durable in relation to services lies at two years.

215 C Barnard "British Jobs for British Workers' The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38:3 *Industrial Law Journal*, p 255.

216 Chapter 3, par 3.4.2.

217 Barnard 2009, p 255-256; Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ (1997) L18/1, Article 3(8).

izens. For all purposes except labour, Croatian nationals fall under the regime applying to EEA citizens.[218] These restrictions apply until the 30th of June 2018 but may be imposed until July 2020 if such is required to avoid serious disturbances to the labour market.[219] Due to the restriction of the free movement of workers, Croatian nationals must obtain a worker authorization registration certificate.[220] These certificates are granted if the conditions relating to employment on the basis of the Immigration Rules as they applied to third-country nationals on the 9th of December 2011 are met. These conditions apply through a Statement of Relevant Requirements.[221] This structure has to do with the standstill obligation in relation to the free movement of workers that applies since the signing of the Treaty of Accession of Croatia to the EU.[222] As described in the previous chapter, issues relating to this restriction arise due to claims of self-employment where the person in question is actually an employee (bogus self-employment), and the posting of workers where the situation actually involves the hiring-out of employees.[223] The consequences of mistakes can be serious as possible sanctions relating to employment without authorization include fines and criminal offences. These sanctions may apply to the Croatian national and the employer.[224] Harvey and Behling indicate that the demarcation between employment and self-employment in the UK is based on case law. Identifying various defining conditions throughout history, they conclude that such decisions are based on the specifics of a case and that none of the principles should take precedence. The principles they indicate are the following:[225]

- Control (Duty to obey orders, discretion on hours of work, supervision of mode of working)
- Integration (discretionary or grievance procedure, inclusion in occupational benefit scheme)

218 Accession Regulations 2013, Article 4, 6 and 7. See also: Home Office, Guidance for nationals of Croatia on obtaining permission to work in the UK, version 8/2014, par 2.

219 See for a more extensive description chapter 5, par 5.4.4.

220 Accession Regulations 2013, Article 8-10.

221 UK Home Office, Statement of Relevant Requirements which must be met for the purpose of regulations 9 and 10 of the Croatian Regulations, April 2014.

222 Act of Accession concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union OJ (2003) L236/46, Annex V, par 13 which indicates that if Member States impose restrictions relating to employment, these restrictions may not be more restrictive than the regime applying on the date of signature.

223 See extensively: chapter 5, par 5.4.4.

224 Accession Regulations 2013, Articles 11-18.

225 M Harvey and F Behling 'Self-employment and bogus self-employment in the construction industry in the United Kingdom' (2008) Expert Country Report, available online: <http://www.efbww.org>, p 160 (last visited 1 October 2015).

- Economic reality (method of payment, freedom to hire others, providing own equipment, investing in own business, method of payment of tax and national insurance, coverage of sick pay and holiday pay)
- Mutuality of obligation (duration of employment, regularity of employment/re-engagement, right to refuse work, customary to the trade)

The Guidance for nationals of Croatia on obtaining permission to work in the UK provides similar, non-exhaustive, criteria:[226]

- Do you have to do the work yourself?
- Can someone tell you, at any time, what to do, where to carry out the work or when and how to do it? Can you work a set amount of hours?
- Can someone move you from task to task?
- Will you be paid by the hour, week or month?
- Can you get overtime pay or bonus payment?
- Can you hire someone to do the work or engage helpers at your own expense?
- Do you provide the main items of equipment to do your job, not just the small tools that many employees provide for themselves?
- Do you agree to do a job for a fixed price regardless of how long the job may take?
- Can you decide what work to do, how and when to do the work and where to provide the services?
- Do you have to correct unsatisfactory work in your own time and at your own expense?

As is suggested in relation to the suspension of the freedom of movement of workers for transition citizens within the Dutch legal order,[227] another solution is to revert to information relating to a fiscal demarcation. The Guidance indicates that if the criteria leave doubt, relevant information from the government department of Revenue and Customs might be useful.[228] As is clear from these criteria, though the outcome is important, these indicators are not capable of sharp demarcations. Misuse by both sides, i.e. government exaggerations and true bogus self-employment, forms an issue. A UK government estimate of July 2008 refers to 200.000 bogus self-employed out of a total of 710.000, thus roughly one-third. While it is not possible to provide anything but estimates, Harvey and

226 UK Home Office, Guidance for nationals of Croatia on obtaining permission to work in the UK, version 9/14, par 12 and 13.
227 Chapter 5, par 5.4.4.
228 Accessible at the Government department Her Majesty's Revenue & Customs website: <http://www.hmrc.gov.uk/> (last visited 1 October 2015), see also Harvey and Behling 2009, p 161-163.

Behling indicate that one-fourth would be in line with other countries, as well as with site surveys.[229]

Hiring-out

Croatian nationals posted as workers by an undertaking established in an EEA State do not require a worker authorization registration certificate.[230] The Accession Regulations 2013, which exempts this category from the certificate, contain a copy-paste error as the April 2014 text reads as follows:

> (19) A Croatian national is not an accession State national subject to worker authorisation during any period in which he is a posted worker.
> (20) In paragraph (19), 'posted worker' means a worker who is posted to the United Kingdom, within the meaning of *Article 1(3)* of the Council Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services *(a)*, by an undertaking established in an EEA State [emphasis added].[231]

It is clear that the UK legislator limits the exemption to posted workers in the sense of Article 1(3)(a) of the Posted Workers Directive, however, the cited Directive was probably pasted in the middle of this reference. The current text would include all three categories of Article 1(3) within the definition of posted worker, and thus within the exemption to the certificate obligation, as well as provide a redundant '(a)' after the word services. Clearly, intra-corporate transfers and hiring-out services are not meant to be part of this definition.

Separating between the posting of workers and hiring-out services should be based on the EU law definitions. As described in the previous chapter, the *Vicoplus* case provides three criteria: the worker remains employed by the service provider; hiring-out has as its purpose the movement of workers, whereas posting is ancillary to the provision of services; hiring-out entails that the employee works under the control and direction of the user undertaking, in contrast with posting where this direction and control is exercised by the company posting the worker.[232]

229 Harvey and Behling 2009, p 165-166.
230 Chapter 5, par 5.4.4.
231 Accession Regulations 2013, Article 2.
232 Chapter 5, par 5.4.3 and 5.4.4.

6.4.5 Turkish nationals

Turkey is listed as a country of which the nationals require a visa.[233] The ECJ *Savas* case[234] clarified that the UK cannot impose more strict rules to self-employed Turkish nationals than were in effect at the time of the UK's accession to the, then EEC. The UK accession on 1 January 1973 meant that the EC-Turkey Agreement applied to it and from that date Article 41 of the Additional Protocol provides a standstill clause in relation to the self-employed. As is also apparent from the *Tum and Dari* case, the standstill clause relating to the self-employed does not grant a right of entry, but it does prevent the imposing of obligations introduced since its application.[235] Consequently, the UK Turkish Business Person Visa is based on the requirements of the 1973 business provisions. These requirements are that the Turkish national must: have a genuine intention to set up a viable business; have sufficient funds to establish the business; be able to pay your share of the costs of running the business; show that your share of the profits will be enough to support you and your family without you needing to have another job. Moreover, Turkish nationals joining an existing partnership or company must demonstrate that they will have an active part in running the business, and that there is a genuine need for his or her services and investment.[236]

6.4.6 Comparison with the EU freedom to provide services

The implementation of the EU rules relating to freedom of movement for service providers is provided through separate regulations that implement Directive 2004/38/EC in relation to EEA nationals. This implementation follows the Directive and therefore UK legislation itself is in conformity with European obligations relating to entry and residence for service providers. The Immigration Rules do not address EEA nationals and service providers are not confronted with the obligations resulting from that legal regime. Additionally, the rules applying to Turkish service providers are based on the legal regime that applied when the standstill clause entered into effect.

Problems arise in relation to third-country nationals relying on the EU freedom to provide services as well as in relation to EU nationals facing the transitional regime applying to recently joined Member States. The complex legal implementation based on revoked Regulations with clauses saving certain provisions seems

233 Immigration Rules, par 6 and Appendix 1(1)a.

234 Case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas* ECLI:EU:C:2000:224, par 49-50 and 69. See chapter 5, par 5.4.5.

235 Case C-16/05 *The Queen, Veli Tum and Mehmet Dari v Secretary of State for the Home Department* ECLI:EU:C:2007:530.

236 See the Turkish Businessperson visa page, available at <https://www.gov.uk> (last visited 1 October 2015).

unnecessary complex. Considering the EU requirements relating to implementation this should be remedied.[237] Moreover, the Accession Regulations 2013 contain a textual error, which leads to the inclusion of intra-corporate transfers and hiring-out services. However, this in itself is not in conflict with EU law. A more fundamental problem is caused by the necessity to demarcate service providers from workers due to the temporary restriction of the freedom of workers. The same holds true for third-country nationals posted by an EU service provider. As also indicated in the previous chapter,[238] this leads to misuse on both sides, bogus self-employment, as well as a government that exaggerates the numbers of these bogus self-employed and targets genuine service providers. It should be emphasized that a system where irregularities relating to immigration lead to loss of sponsorship, as well as fines and possible criminal liability, will deter service receivers from relying on risky providers (i.e. Croatian nationals and legally employed posted workers).[239] Additionally, third-country nationals hired-out by their employer in order to perform work in the UK should be treated similar to the posted worker executing a service contract on the UK territory category.

6.5 Conclusions

Comparing the GATS obligations with UK regulations and policy implementing those obligations reveals inconsistencies. This in itself is problematic, and it exacerbates the transparency issue. Conclusions drawn in the Dutch chapter are therefore strengthened by the conclusions drawn here. GATS Mode 4 liberalization is modest, and virtually non-existent in relation to other categories than highly-skilled service providers. The implementation mistakes relating to GATS Mode 4 commitments must be addressed. Besides the identified inconsistencies in the implementation, several conditions applying to GATS Mode 4 service suppliers are suspect. These conditions might form more stringent conditions than inscribed in the UK's Mode 4 commitments. These matters are the tightened general refusal grounds and the entire concept of sponsorship a matter that will be analysed in the last chapter.

Additionally, a case can be made in relation to several issues that the implementation method runs counter to GATS obligations. The current implementation is non-transparent, possibly to a fault, and the chosen area of legislation is ill-suited to implement liberalization related to temporary service provision. In addition to the limitations imposed on the use of policy guidance based on UK law itself, the GATS

237 Chapter 3, par 3.7.
238 Chapter 5, par 5.5.
239 Chapter 5, par 5.4.6.

might form a problem to this choice of implementation as well. This matter will be discussed in the concluding chapter in parallel with the Dutch implementing legislation, as the issue is similar. As indicated in the previous chapter, GATS obligations relate to temporary service provision, yet the UK implementation is part of a general regime that includes labour migration. It should be made clear that the UK PBS is more suited to address the specific of GATS mobility than the relevant Dutch acts, as the PBS categories are tailored to the specifics of the form of mobility. As such, tier 5 indeed addresses temporary movement. Nevertheless, sponsorship is the prime example of a concept difficult to reconcile with GATS Mode 4 movements. As indicated in relation to the Dutch legislator, taking Mode 4 commitments serious might require a clear entry route which simply lists the conditions applying on the basis of those commitments and the GATS.[240]

Under EU law, the main problems exist in relation to posted (third-country) workers and transition citizens. This is unsurprising given the tightening of the immigration rules. The main rules applying to economically active third-country nationals are much more stringent, and entry schemes relating to international liberalization increasingly may be regarded as holes in that system. These international obligations nevertheless prevail over national law, and the UK legislator should resist the tendency to raise the threshold for entrants under these international schemes.

240 Chapter 5, par 5.5.

Chapter 7

Conclusion and analysis

7.1 Thesis overview

The two international trade liberalization regimes addressed in this thesis encompass the concept of service mobility, the right of natural persons to cross borders to provide services. Allowing a foreigner to perform an economic activity on its territory has consequences for the sovereignty of that state to address two central policy areas, its immigration policy and its labour market policy. Both World Trade Organization law, in the form of the General Agreement on Trade in Services, and European Union law influence a state's right to regulate immigration and labour market access. These are traditionally policy areas in which states are reluctant to accept binding international commitments. One of the core functions of a state is to determine which foreign citizens may enter its territory. At a level beyond regulating access to the territory, the state determines access of foreigners to the labour market and the welfare state. It is exactly these policy areas that were left out of the scope of the GATS. The GATS does not apply to measures affecting natural persons seeking access to the employment market of a WTO Member on a permanent basis, nor does it apply to measures regarding citizenship or residence. Additionally, measures regulating the entry of natural persons to, or their temporary stay in, the territory of a WTO Member are exempted from the agreement as well. In contrast, EU law does not provide such limitations. The internal market includes free movement of workers. EU law moreover recognizes the need to include extensive movement rights for those wishing to utilize the freedoms that constitute the internal market. Without unhindered rights of entry and residence, including rights

for accompanying family members of the persons bearing movement rights, free movement will not be used in practice. As the internal market is the core incentive driving the European Union, this need is taken seriously in the form of extensive rights and narrow exceptions available to Member States to limit these rights. EU law provides a clear example that service trade liberalization and a true level playing field for service competitors requires service mobility. The EU secondary legislation investigated in this book, the Citizens Rights Directive and the Posted Workers Directive, as well as the extensive enforcement possibilities provided under EU law, demonstrate what is required to achieve trade liberalization in the field of service mobility. These additional rules and the extensive enforcement possibilities are not available under WTO law. There is an inherent tension to be found in the concept of the GATS and the inclusion of movement of natural persons (GATS Mode 4) on the one hand, and the demonstrated willingness of the investigated WTO Members to retain sovereignty over immigration and labour market access. Under EU law this tension exists as well, it is clearly revealed in relation to service mobility involving third-country nationals and citizens of Member States that have recently joined the EU (transition citizens). This tension has led to the central question of this research:

How do states implement obligations to liberalize service mobility undertaken in a beyond state sovereignty context and how does this influence a state's interest to maintain control over its immigration and labour market policies?

The two elements involving this tension are irreconcilable, yet the investigated EU Member States, the Netherlands and the United Kingdom have found a method to express willingness to, and accept, the liberalization on the GATS level, while maintaining control at the national level. The implementation of service mobility involves an artificial adoption of that concept within the same legal framework that addresses permanent immigration and labour migration. Another consequence is that the categories of service providers which are perceived as beneficial, i.e. accountants, managers and like individuals are indeed welcome, while low-skilled service providers are not. During WTO negotiations, Dutch and UK negotiators ignore the reality of the manner in which the Justice and Home Affairs Ministry addresses migration. The result is *inter alia* a so-called blanket reference where the GATS commitment becomes subject to the continuance of all other requirements of EU and Member States' laws, regulations and requirements regarding entry, stay, work and social security. Once commitments are accepted, their essence is then ignored by the Justice and Home Affairs Ministries when implementing them. No attempt is made to reflect the different nature of binding commitments relating to temporary service mobility on the one hand, and other forms of economic migration on the other.

Under EU law such tactics cannot hold. Despite efforts of various EU Member States to maintain sovereignty over third-country nationals and transition citizens utilizing service mobility rights, the European Court of Justice has consistently quashed attempts to apply a regulatory system dealing with labour migration to the posting of workers. This includes providing labour services, the hiring-out of personnel, which is considered to be a form of service provision by the ECJ. Consequently, the irreconcilable nature of service mobility liberalization and maintaining sovereignty over immigration and labour market policies is clearly revealed. Comparing the GATS with the EU freedom of movement of service providers therefore demonstrates what happens when service liberalization is taken seriously and benefits from a strong compliance mechanism.

This in turn begs the question where this tension comes from. Why do the investigated EU Member States accept service trade liberalization and why have they accepted the inclusion of service mobility? The answer to this question can be found in the aim of both international legal orders, ensuring lasting peace through mutual economic growth in the form of market integration. This initial aim certainly was based on the idea that market integration would lead to economic growth. Over time, economic growth has become central in relation to service trade liberalization. Developing from the residual tertiary economic sector, services constitutes the primary economic sector in the EU. The estimated gains relating to service mobility are sought at the international level, explaining why the EU and its Member States actively seek, and continuously invest greatly, to achieve service liberalization within the framework of the WTO. At the national level the investigated Member States demonstrate the strong urge to control movement of natural persons. Fears over mass, or uncontrolled immigration, social dumping and a regulatory downward spiral lie at the heart of this urge. This leads to the perceived dichotomy in the Dutch and the United Kingdom's approach towards service mobility.

7.2 Main conclusions WTO law and the GATS

Coverage and scope of the GATS

The GATS is intended to gradually work towards the creation of a level playing field in service provision. Its consequential impact on immigration and labour market policies is determined by its scope, the extent of its obligations, the provided exemptions and the effectiveness of its enforcement mechanism. The scope of the GATS is determined by the definition of services and the demarcation of that concept from other economic activities, within the context of this research notably labour. Liberalization is sought in the form of disciplines applying to measures by Members affecting trade in services, where the emphasis lies on market access for

foreign services and service providers, not domestic deregulation. The GATS lacks detailed guidance in relation to the dividing line between service provision and labour. As the GATS does not cover access to the labour market, this could potentially lead to similar difficulties as currently exist under EU law in relation to the posting of workers, and in particular hiring-out services. The dividing line between Mode 3 and Mode 4, commercial presence and movement of natural persons, is unclear as well. This lack of clear guidance on the definitions is unproblematic in relation to the Mode 4 commitments investigated in this study. The inscription of commitments is based on the GATS Scheduling Guidelines and the Services Sectoral Classifications list. As a consequence, the scope of the service sector can be found in the commitments. As concluded by the Appellate Body, the Scheduling Guidelines are supplementary means of interpretation when interpreting the GATS and schedules of commitments. Where the Scheduling Guidelines are not used, a definitional debate concerning a specific commitment and the scope of the definition 'service' might emerge. To prevent discussions, it is highly recommendable to clearly specify the scope of Mode 4 commitments and adding commitments on a sector by sector basis in accordance with the Sectoral Classifications. Providing Mode 4 commitments in relation to entire sectors may be far off, definitional problems will occur once commitments move beyond the single selected category of service supplier in a specifically listed sector phase. WTO Members should also clearly indicate the maximum duration of Mode 4 service provision, as the GATS itself does not define temporary. The EU Uruguay Round commitments, provide that contractual service suppliers have access for three months. The other categories are limited to a duration 'defined by the Member States, and, where they exist, [Union] laws and regulations regarding entry, stay and work.' Not defining temporary stay in the commitments is highly undesirable as it leads to uncertainty. Since 2001 a new negotiation round is ongoing, the Doha Round. The EU Doha Round revised offer, the commitments the EU has offered during the negotiation process, does provide specific maximum durations for all categories. The clarity provided by the revised offer is highly desirable. As an offer is not binding, these clarifications should be maintained until the Doha Round is concluded.

As to the GATS actual intrusiveness, it is up to WTO Members to provide specific commitments in relation to each service sector and each mode of supply. This bottom-up approach towards the liberalization of service sectors makes the GATS almost optional for WTO Members. However, the liberalization agenda of the GATS entails that negotiations concerning service liberalization must continue through successive negotiation rounds. The current level of liberalization consists of the commitments that were inscribed during the negotiation round which led to the creation of the WTO and the GATS, the Uruguay Round. This round was completed in 1994, though negotiations on Mode 4 commitments continued up to 1996 to address the poor and inbalanced results from a developing country perspective of

commitments undertaken during the round itself. From the negotiating history of the GATS and the post-Uruguay Mode 4 negotiations it is very clear that the GATS covers all categories of natural persons. There is no restriction in the GATS itself concerning skill levels. This wide coverage of Mode 4 is the result of a trade-off where liberalization relating to commercial presence was accepted if mobility of natural persons was included as well. Initially, the Uruguay Round led to commitments in relation to business visitors and intra-company transfers, which are closely related to Mode 3. It is therefore unsurprising that developing countries were unhappy with this result. The only 'full' Mode 4 category, is formed by contractual service suppliers. Service providers of a WTO Member State may provide services in another WTO Member State and post its personnel on the territory of that state to execute the service contract. This category was added to the EU Mode 4 commitments as the outcome of the continued negotiations after the completion of the Uruguay Round to remedy this imbalanced outcome for developing countries. Yet, despite the extended negotiations the EU Mode 4 commitments inscribed as the outcome of the Uruguay Round are limited to a few categories of service providers, mostly involving the highly-skilled. Additionally, the provided commitments are severely restricted by a range of limitations and conditions.

Studying the Doha Round negotiation process and the submitted offers and revised offers demonstrates little progress relating to Mode 4. The revised EU offer does add graduate trainees and independent professionals as additional categories, however, the increase in liberalization again mostly relates to the highly skilled and access is granted under severe limitations. The example of a six year experience requirement for independent professionals, as is currently part of the offer, is exemplary. The negotiating process in the Doha Round is moreover clearly struggling, be it that the Bali Agreement and the delayed will to implement the outcome does provide momentum. The momentum in relation to WTO service liberalization is shifting to the plurilateral arena. With the GATS framework serving as a model, increased service trade liberalization is sought in the form of Free Trade Agreements. Additionally, the Trade in Services Agreement is currently being negotiated by a group of fifty-one WTO Members, including the EU Member States.[1] These initiatives circumvent the deadlock reached in the WTO multilateral trade negotiations. However, this shift from multilateralism to bilateralism or plurilateralism in relation to trade liberalization will have consequences for the balance of negotiating powers between participating states when compared to the WTO negotiations. The EU will have more control over the outcome of negotiations when dealing with a single, or a limited group of develop-

1 W Schöllman *Economic Significance of Trade in Services Background to Negotiations on a Trade in Services Agreement* (European Parliamentary Research Services February 2015), p 1, available online through the website of the European Parliament: <http://www.europarl.europa.eu/> (last visited 1 October 2015).

ing states. Developing states are more organized at the WTO level and benefit from each other's knowledge and resources.[2]

GATS obligations and exceptions

The regulatory framework of the GATS provides for general and specific obligations. The general obligation that is relevant to assess the impact of GATS Mode 4 obligations on national immigration law and labour market policies is the transparency obligation. Transparency may be said to form one of its key features. Regulatory and language differences can lead to serious hindrances for service providers, and service provision is often heavily regulated. As a consequence, understanding a foreign regulatory regime may prove quite difficult. The same holds true for entry, residence and access to the labour market for aliens. Movement of natural persons to provide services therefore requires compliance with various legislative rules at the national level. This entails that transparency in relation to Mode 4 is all the more important in order to facilitate this form of service provision, in particular for service providers who do not have extensive capacities to investigate the host state (i.e. small and medium sized enterprises and individual service suppliers). Additionally, investing in this understanding is demanding in relation to services which are by definition temporary. Thus, to achieve meaningful liberalization of Mode 4, access on the basis of commitments should be facilitated by clear and transparent regulation. Additionally, transparency facilitates negotiations, as it allows negotiators to identify barriers to service trade which may then become subject of specific requests in negotiation rounds. In specific, transparency entails publication and notification requirements, and has led to administrative obligations. As such, administrative procedures relating to GATS Mode 4 require transparent procedures. Moreover, administrative decisions affecting trade in services require the possibility to independent review.

Specific commitments are subject to the obligations in the market access, national treatment and parts of the domestic regulation provisions. These obligations target market access restrictions and discriminatory measures. The domestic regulation obligation complements this approach by targeting unnecessary non-discriminatory domestic regulations. As such, the combination of these provisions ensures access to a service market, a level playing field and the abolishment of unnecessary non-discriminatory measures. Market access restrictions in relation to Mode 4 usually take the form of work permit quota and economic needs tests. The provision on domestic regulation regulates non-discriminatory measures which are relevant to service provision, in specific, licensing and qualification requirements

2 See for instance C Bellmann 'The Bali Agreement: Implications for Development and the WTO' (2014) The Graduate Institute International Development Policy Articles and Debates 5.2, par 2.

and technical standards. Such measures set the conditions applying to the service provider or to providing a service. Measures of general application must be administered in a reasonable, objective and impartial manner. Transparency conditions also apply to requests for authorization, and WTO Members are required to adequately verify the competence of professionals. The domestic regulation rules are still incomplete as the encroachment on regulatory autonomy, and the discussion surrounding it, proved too great to overcome during the Uruguay Round negotiations. Instead, in the absence of the conclusion of these rules in the form of Disciplines on Domestic Regulation, provisional measures included in the GATS apply.

Licensing and qualification requirements and technical standards should be based on objective and transparent criteria, not more burdensome than necessary and licensing procedures may not in themselves form a restriction on the supply of the service. An important limitation to the provisional application of these conditions is that restrictions relating to licensing, qualification requirements and technical standards can be imposed if they could reasonably have been expected at the time of the inscription of the commitments. This limitation may effectively entail a standstill obligation, allowing existing regulation to remain in place. Alternatively, it requires a difficult assessment of what could be expected from a regulatory perspective in a given service sector in January 1996. As the provision on domestic regulation was left incomplete, it specifically provides a mandate to negotiate disciplines which will replace the provisional rules.

Depending on the final text, this could lead to a requirement to justify unnecessary barriers in light of legitimate aims, or even a review of reasonably available alternatives to achieve a legitimate aim that is less restrictive. As with the Accountancy Disciplines, this test applies to licensing requirements and procedures, technical standards and qualification requirements. Consequently, the national regulations setting the conditions applying to the service provider or to providing a service are all subject to this test. The current provisional measures presumable entail a (limited) standstill clause, yet the Uruguay Round commitments need to be brought in line with the disciplines once the disciplines are created and enter into force. Adopting new commitments before it is clear how intrusive the domestic regulation obligation will become seems unwise. The current regulatory framework is incomplete, as the differing viewpoints on the impact on the regulatory autonomy of the domestic regulation obligation could not be resolved during the Uruguay Round. Undertaking new commitments without reaching this agreement is therefore ill-advisable.

The GATS provides several grounds which allow WTO Members to deviate from obligations, including those undertaken in specific commitments. As such, measures which fall within the scope of these exceptions remain unaffected by the GATS obligations. Of the general exceptions the protection of public order in cases of a genuine and sufficiently serious threat posed to one of the fundamental in-

terests of society, is most relevant to the movement of natural persons.[3] Invoking general exceptions is subject to a necessity test, as is confirmed in the *US - Gambling* case. The Annex on Movement of Natural Persons provides additional exceptions specifically in relation to Mode 4. The GATS does not apply to measures affecting natural persons seeking access to the employment market of a WTO Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis. As these exceptions relate to measures concerning permanent residence and employment, they relate to the scope of the GATS. Additionally, measures regulating the entry of natural persons into, or their temporary stay in, the territory of a WTO Member are exempted from the agreement as well. This includes measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across borders. This means that in itself immigration law is not affected by GATS Mode 4; however, an important limitation can be found in the condition that such measures must not be applied in a manner nullifying or impairing benefits provided in a specific commitment.

Enforcement

The WTO Dispute Settlement System is one of the main outcomes of the Uruguay Round. Over time GATT dispute settlement has shifted from a 'power' to a 'rules-oriented' approach and the WTO DSS consolidates and confirms this shift. For the GATS, dispute settlement is available in case of violation and non-violation complaints. Failure to carry out obligations or specific commitments, including through omission, may lead to a violation complaint. Non-violation complaints have not played a role within the GATS framework so far, but may prove important in situations where reasonable expectations relating to commitments are impinged upon. Nevertheless, a major problem in relation to the investigated topic in this research is the fact that dispute settlement and the enforcement of WTO obligations in cases of a breach of commitments is available to states only. This means that service providers benefiting from commitments only have indirect access to dispute settlement through a lobby performed at the level of a WTO Member's government. While in theory states may enforce GATS Mode 4 commitments, in practice states will likely not request dispute settlement in this sensitive area, and certainly not in relation to small and medium sized enterprises and individual service suppliers. This entails that the in this research identified potential violations of GATS obligations are unlikely to be confirmed through dispute settlement and will likely not be enforced. This is also troubling as some GATS obligations are not

3 Naturally, the other exceptions may be relevant in specific cases. As an example, an Article XIV bis security exception applies if an individual wants to rely on Mode 4 commitments while disclosing essential security interest information of a WTO Member.

entirely clear, are not flanked by measures to provide them effect (as is the case with EU secondary legislation) or even still awaits completion, as is the case with the domestic regulation obligation.

7.3 Main conclusions EU law and the freedom of movement of service providers

The internal market forms the heart of the European integration project. The internal market for trade in services has reached a level where the right to pursue economic activities in another Member State should be available under the same conditions as those imposed by that state on its own nationals. Moreover, any hindrance to cross-border service provision is suspect and must be objectively justified with narrowly defined justification grounds. The ultimate aim is to reduce barriers to trade in order to reach a level playing field. This requires the removal of unnecessary barriers to trade and a coordination of legislation of the Member States.

Coverage and scope of the EU freedom of movement of service providers

The Treaty on the Functioning of the European Union does not provide a clear definition of services or service provision. The defining elements of this fundamental freedom and the manner in which to distinguish service provision from the other fundamental freedoms are clarified in case law. The ECJ has interpreted the scope of the freedom to provide services in relation to the other fundamental freedoms. Economic activities provided normally for remuneration, as indicated in the TFEU itself, are distinguishable by the self-employed nature of the provider and their temporary nature. Depending on the form (for instance supplying, advice or movement), finance related economic activities will entail capital movements. Service provision in the sense of the TFEU entails an economic activity, which means that services financed entirely or mainly by the public funds are exempt from its scope. The same holds true for non-profit services, as some form of remuneration is required. Additionally, under EU law, restrictive measures can be justified when the restrictive measure relates to a service of general economic interest.

The EU free movement of service providers applies first and foremost to European Economic Area citizens. Of these citizens, transition citizens may face restrictions in relation to hiring-out services. However, such citizens may be posted on the territory of another Member State as employees of a service supplier. Posting of workers, including with the explicit purpose of hiring-out personnel, leads to derived mobility rights for third-country nationals. The ECJ has clearly ruled that the posting of workers falls within the scope of the freedom to provide services. This not only relates to the posting of employees to execute a service con-

tract, but also to the hiring-out of personnel. Consequently, the question whether the service provider is considered to be an EU service provider is relevant for the application of EU law. The reasoning adopted by the ECJ is that posted workers do not affect the labour market of the host state as they will return home after the service provision has ended. This means that the nationality of employees of such service suppliers is irrelevant as their mobility rights are derived from the right of the employer. On the basis of association agreements nationals of states that are accepted as candidate Member States are granted rights in relation to service provision as well. Of such agreements, the Association Agreement with Turkey is used in this research as an example. The Additional Protocol to the Agreement with Turkey contains a standstill clause for service provision which essentially means that since the entry into force of that clause in 1973 more stringent conditions may not be imposed.

EU freedom to provide services obligations and exceptions

Any restriction that may hinder trade, including potential hindrances, is prohibited unless justified. As Article 56 TFEU, the provision encompassing the freedom to provide services, was interpreted to have extended vertical direct effect, this includes restrictions by private parties having special powers of a regulatory nature, such as the trade unions in the *Laval* case. The EU internal market requires the removal of barriers to trade if such barriers do not serve a legitimate regulatory objective. Under EU law, objective justification consists of an application of the full form of the proportionality principle, including the replacement of measures if the same legitimate aim can be achieved through less restrictive means.

The negative integration of Article 56 TFEU is strongly supported by positive integration, as migration and residence rights in relation to service provision are fully harmonized in the Citizens Rights Directive. This directive ensures that service providers may enter and reside in the host state, that the members of their family and household may accompany them. Generally speaking, EU citizens providing services are almost in an identical position as economically active nationals. Additionally, market access rights are covered by the Services Directive, which is horizontal in its application, be it that various subjects are removed from its scope. Importantly, labour law, social security and the entire subject of the Posted Workers Directive is removed from the scope of the directive. As a consequence, the substance of the Service Directive is not relevant in relation to the topic discussed in this work, yet the controversies surrounding its creation are revealing. In essence, accepting home state control in relation to cross-border service provision proved a bridge too far. Fears over social dumping have influenced the final scope of the directive, which correlates to its inapplicability to the topics here discussed.

The ECJ provides that restrictions to the posting of workers must be justified which essentially means that Member States may only impose mild prior-information obligations with very few administrative formalities to verify the legality of the posting. The exception is that transition citizens (in 2015 limited to Croatian nationals) who are hired-out to a Member State may be subject to the full national regime of access to the labour market for third-country nationals as this is based on the prevention of disturbances on the labour market due to mass influx post accession of transition citizens. This does not apply to third-country nationals who are hired out, as this mass influx risk does not exist in relation to such services. Differences in labour regulations between the Member States have led to the adoption of the Posted Workers Directive which allows the host state to impose its core minimum labour laws to posted workers. The same holds true for universally applying collective labour agreements.

Enforcement of EU law

All these rights and obligations are embedded in a well-developed implementation and enforcement mechanism. EU law enjoys supremacy over national law and in cases of conflict, national law must be set aside. Additionally, the authorities of Members States have an obligation to actively prevent violations of EU law. From the perspective of the service provider, several mechanisms ensure access to courts at national level if rights granted on the basis of EU law are infringed. The three main mechanisms ensuring the effectuating and implementation of Union law are consistent interpretation, direct effect and the principle of state liability. The result is a very effective enforcement mechanism that approaches upholding EU rights from all angles, i.e. the EU itself in the form of the Commission, the Member States in the form of active compliance duties and the individual service provider in the form of judicial protection. An overview of the interaction between WTO obligations, EU law and the domestic legal order of Member States reveals that implementation of WTO obligations are to a modest extent facilitated by this enforcement mechanism of EU law. Firstly, if WTO law is specifically transposed into Union law, the EU enforcement and implementation regime applies. Secondly, consistent interpretation of EU law on the basis of WTO law is accepted and applied as an interpretative method by the ECJ. On the other hand, the concepts of direct effect and state liability do not apply to WTO obligations. Two exceptions apply. Firstly, the *Nakajima* case indicates that WTO obligations can have direct effect in relation to EU measures which implement such obligations. Secondly, the *Fediol* case establishes the same rule in relation to express references in EU law to a particular WTO obligation.

7.4 Comparing goals and methods, WTO an EU service trade liberalization

Comparing the WTO and the EU is difficult as these forms of international trade liberalization are fundamentally different in relation to their territorial scope as well as the nature and level of integration sought. However, focusing on functionality allows a comparison in relation to service trade liberalization and the method adopted to achieve the aims sought by both legal orders.

The aim of service trade liberalization

Regulating international trade serves several global interests. Intended to prevent conflict, the method of addressing protectionism serves its own purpose in the form of economic growth. Service provision has become of fundamental importance in the global economy, constituting a major part of the Gross Domestic Product of most states. The GATS is intended to gradually work towards the creation of a level playing field in service provision. The importance of the service sector is reflected in ambition expressed in relation to trade liberalization. The GATS is the first attempt to include services within the almost globally operating World Trade Organization. The EU Member States have made significant investments to liberalize trade in services through the GATS, as negotiators are working to achieve a result since November 2001. From the outset, service provision is part of the EU internal market, initially as the residual economic freedom. Around the same time as the creation of the GATS, the EU legislator has emphasized the importance of completing the internal market in the form of the Single European Act. The Services Directive is a specific expression of that importance in relation to service provision. Various authors, as well as many policy documents at the WTO and the EU level, indicate that much is expected from service trade liberalization. Reducing existing barriers to trade in services is expected to lead to a growth in GDP of both the home and the host state. Estimates indicate that, in particular restrictions relating to the mobility of service providers are to be measured in hundreds of billions of dollars of global GDP. This would require a true lifting of restrictions in relation to temporary movement of natural persons.[4] Many studies indicate that liberalizing this form of trade in services will also lead to a more equitable distribution of the benefits of trade from the perspective of developed and developing countries. Yet, even without accepting such estimates, the importance of reducing barriers to trade in services can be perceived. Service sectors are often highly regulated as well as diversely regulated. Within the EU, only 5 per cent of

4 See for a brief overview of the relationship between liberalization and comparative advantage in service provision: V Hatzopoulos *Regulating Services in the European Union* (Oxford University Press, Oxford 2012), p 15-17.

the GDP realized in the service sector relates to cross-border services provision, and trade in services represents 24 per cent of total EU trade. Liberalization of trade in services is a major policy objective for many states, including the EU Member States. The importance of service trade liberalization is expressly recognized by the EU, both in relation to the internal market and the international negotiation arena. As a consequence, the EU and its Member States continuously make significant investments at the WTO level, at the EU level, and increasingly in the form of a plurilateral Free Trade Agreements, to achieve liberalization of trade in services. The continuance of these investments is evident, for example from the EU's contribution to the Trade in Services Agreement, the attempt to break the deadlock in relation to services negotiations in the WTO Doha Round negotiations.

The WTO and the EU strive towards the creation of a level playing field for national and international competitors on the markets of their respective member states. The nexus between interstate trade and war and peace has led to economic integration in the form of trade liberalization as a form to achieve lasting peace. This nexus forms the heart of both international organizations. Clearly, the liberalization paths and end goals are different. However, part of the adopted method, the removal of barriers to trade in services leading to equal competitive conditions, is similar.

The need to include service mobility

Where cross-border movement of goods is almost always physical, many services are connected to the supplier and cannot be transferred separately. Many services can be provided without movement, including in the form of Electronic Service Delivery. As an example, an architect in theory does not have to be physically present and it is not uncommon to receive financial advice services electronically. In reality, a construction project in another country requires on-site visitations. In relation to many services, the service provider may be required to confer or discuss details with the receiver face to face, even where ESD is possible. Additionally, various services will require the providers to send their personnel to perform the service contract for them. Complicated service contracts are difficult to execute if the provider has to hire all of its labour in the host state. Having to work with new personnel, and the hiring process itself, clearly leads to serious competitive disadvantages in relation to domestic service providers. Service provision therefore often requires proximity between the supplier, or its personnel, and the receiver. This in turn means that service trade liberalization requires the movement of natural persons across borders.

Reluctance to liberalize, service mobility, immigration policies and labour market policies

Studying the GATS and the EU freedom of movement of service providers reveals reluctance of EU Member States to reduce barriers to service mobility. This reluctance is most evident in relation to non-EEA nationals, including in relation to nationals of new Member States whenever the EU enlarges. It is also evident from the drafting process of the Services Directive. The need to include service mobility in a regulatory framework dealing with service trade liberalization has significant consequences at the national level. When states accept this form of trade liberalization they limit their sovereignty in relation to immigration and labour market policies. These are traditionally policy areas in which states are reluctant to accept binding international commitments. One of the core functions of a state is to determine which foreign citizens may enter its territory. At a level beyond regulating access to the territory, the state determines access of foreigners to the labour market and the welfare state. Consequently, service mobility on a global scale, GATS Mode 4, is revolutionary and should be viewed within the context of the immigration and labour market policies which it directly influences. The European integration project is regional but in a sense just as revolutionary. This is perhaps less evident due to the level of integration already achieved, yet due to this integration, the tensions revealed under EU law are present at a deeper level of national legislation in relation to equal treatment. It is also evident in relation to non-EEA nationals.

Clearly, both the GATS and EU law influence sovereignty over admittance of foreigners to the territory in the form of binding international obligations. The same holds true in relation to the labour market. Though service provision is temporary, the economic activity performed by a foreign national on the territory of the host state can no longer be performed by a domestic worker. Where there is a shortage of skills, this will be less problematic than in sectors where many domestic workers could perform the same activity. Besides these factual influences, migration is a topic that receives much attention in politics and the media. Important stakeholders in the Netherlands and the UK express the idea that immigration is 'out of control'. This argument can be heard in the political arena, at the legislative level, and in the public debate. While this expression may not be relevant to, or directed at temporary service providers, due to legislative choices this form of movement is strongly influenced by these expressions. In relation to the labour market, a survey of several studies within the field of economic science does not simply confirm or deny the viewpoint that immigrants in general profit from welfare systems and compete for employment with nationals. Such studies relate to permanent migration. Nevertheless, the perception increasingly applies to almost all forms of migration. For GATS Mode 4 commitments, and where this is still allowed in relation to EU service suppliers, services mobility is implemented in the

Netherlands and the UK in legislative Acts that also regulate labour migration. Consequently, these viewpoints influence the implementation of services mobility, despite its temporary nature and its disconnection from the welfare state. International obligations derived from the GATS and EU law have an important function in this field as they prevent a unilateral tightening of the national rules regulating service mobility.

Obligation to liberalize

Accepting service mobility is, or in the case of the GATS, may be, a matter of fulfilling international obligations. An obligation to adopt Mode 4 commitments may to a certain extent be perceived in the WTO legal order. The WTO operates on the basis of the principle of progressive liberalization, to be achieved in rounds of negotiations. It is true that negotiations are firmly rooted in sovereignty; clearly WTO Members specifically have to offer and inscribe Mode 4 commitments in order to be bound by them. This is a matter of unanimous agreement on the basis of reciprocity if a round is concluded successfully. However, the creation of the GATS was based on a trade-off where liberalization relating to commercial presence was accepted if mobility of natural persons was included as well. Clearly this balance is not reflected in the current commitments. Mode 4 commitments are mostly connected to Mode 3, and even those commitments that are not, are addressed at the highly-skilled. While there is no binding obligation, at least providing more Mode 4 commitments, and in particular commitments not related to ICT, trainees and highly skilled independent professionals is to be seen as delivering on that promise. As that may come across as something negative that has to be done, it must be emphasized that, from an economic perspective, trade liberalization is beneficial. Within the EU legal order, service mobility seems generally accepted by the Member States as an inherent consequence of the internal market. In relation to EEA nationals, movement rights are harmonized, leaving very few administrative and restrictive measures open to the Member States. Additionally, the ECJ is consistent in its interpretation regarding cross-border service provision by an EU service provider which involves the posting of employees and the hiring-out of employees. This consequence of the internal market is less willingly accepted by the investigated Member States. However, to prevent distortion of equality of competition between service suppliers, the Member States have to accept this movement, including the posting of non-EEA nationals. Few administrative measures are left to the Member States. Allowed measures essentially entail verification of the legality of the movement itself in the form of post-movement information requirements.

7.5 Implementation of service mobility obligations in the national legal order

The policies adopted by the Netherlands and the UK in relation to service mobility verify the described dichotomy of the interests and reluctance to liberalize trade in services. The results of a legal assessment of the implementation of international service trade obligations demonstrate that the ministries responsible for this implementation do not easily accept loss of control over entry and access to the labour market. As is apparent, this reluctance is overcome in relation to EU law due to its enforcement mechanism.

7.5.1 The Netherlands

Access to, and residence on, the territory of the Netherlands is regulated in the Aliens Act. The right to perform an economic activity for foreigners is regulated in the Aliens Employment Act. Both Acts rely on three levels of delegated legislation, the last of which consists of policy guidelines which is the level where the GATS Mode 4 obligations are implemented. Various differing entry schemes exist, usually formulated as exceptions to the general rules. These exceptions relate to combinations of the purpose of entry and the nationality of the migrant, consisting of international obligations as well as national policy. In general, non-EEA nationals wishing to provide services in the Netherlands require a residence permit and a work permit. For EEA nationals, the regime is fundamentally different as such service providers derive their rights directly from EU law.

Dutch immigration and labour market rules

Obtaining a residence permit requires a legitimate purpose, including fulfilment of all conditions relating to that purpose. Entry refusal grounds may be invoked on the basis of *inter alia* public policy, international security and public health. Additionally, third-country nationals require a temporary entry visa linked to that same purpose, which may only be obtained from outside the Netherlands. Various conditions apply, including the need for service providers to obtain a Dutch sponsor. Sponsors must accept several obligations relating to the providing of information, record keeping and bear responsibilities for some of the migrants actions. Failure to observe these obligations may result in administrative fines as well as criminal proceedings. The sponsor in relation to a service provider will be the service receiver, or, in the case of ICT, the branch of the company where the transferee will be placed. Controlling access to the Dutch labour market is mainly achieved through the broadly defined term of employer included in the AEA. As anyone allowing a foreigner to perform labour on the Dutch territory is considered to be an

employer, service provision falls within the scope of this definition. This means that a work permit obligation applies. Failure to obtain a work permit may lead to significant fines. Due to the definitional difficulties between service provision and labour at the international level, certain activities is classified as labour by the Dutch labour inspectorate, and Dutch courts, whereas the activity actually concerns service provision. The reverse holds true as well, as labour provision may be wrongfully classified as service provision by those wishing to escape the full regulatory regime addressing labour.

The Dutch GATS Mode 4 commitments and their implementation

The GATS Mode 4 commitments entail that the Netherlands will not impose an economic needs test to the categories of service suppliers indicated in the horizontal commitment. As that condition forms a huge barrier to market access, prioritising EEA nationals and legally present third-country nationals, and as it involves considerate administrative burdens, this is significant from both a market access and a level playing field perspective. However, this is the only implication of the commitments relating to the GATS, as all other conditions, including a work permit obligation and sponsorship, continue to apply.

The implementation of the Uruguay Round commitments is confusing and incorrect. The Dutch implementation sets out with a definition of key personnel, which consists of business visitors and intra-company transfers. This term is not part of the Uruguay Round commitments, nor is it to be found in the Doha Round EU revised offer. Adding this term is confusing, and it should therefore be removed. The intra-company transfer is further divided into managers and specialists which in itself is correct, and the definitions compare with the definitions provided in the commitment. A first confusing definition is the classification of business visitors as having a 'staff position' (in Dutch *staffunctie*) which is probably the translation of the term 'senior position' in the commitment. However, the commitment clearly states that senior position refers to the definition of manager as defined in relation to the ICT commitment. This element is missing in the Dutch definition which should be remedied. This is all the more important due to the translation to Dutch, which makes the connection with the English term senior position more difficult to find. Moreover, the term staff position should have been similar to the term used for the ICT category, which was manager. Adopting two different terms for the same category of persons leads to the assumption that the categories are different, which they are not in the commitment itself. A second, more serious error, is the fact that business visitors in the commitment relates to two activities, the setting up of a commercial presence or the negotiating for the sale of services or entering into agreements to sell services. The second activity of business visitors is not implemented at all. When this implementation failure is

remedied by the Dutch legislator, it should pay attention to the fact that the natural persons who are visiting for the purpose of this negotiating activity are not restricted to managers. They need to be 'representatives of a service supplier'. It is therefore not enough to simply add this activity to the category of business visitor as identified in the Dutch legislation as that category relates to managers only. This also means that the heading key personnel, to address both ICT and business visitors becomes meaningless. Finally, the reference to non-profit organizations in the business visitor category and the double reference to manager or specialist in the ICT paragraph should both be addressed.

Complexity and use of policy guidance

To fully understand the rules implementing the GATS, it is required to take heed of the AA and the AEA, which each have three further levels of delegation. A troubling aspect is that there is almost no reference to the GATS commitments in both Acts and the delegated levels of legislation. Where there is reference, it is not explicit, referring only to the granting of a residence permit if 'international obligations' require this, or providing an exception to the work permit obligation to forward the interest of 'international trade contacts'.[5] The first and only time that the WTO and the specifics of the GATS Mode 4 commitments are mentioned is in the policy guidance level of the AEA. As such, the Effectuating Rules Regulation Effectuating Aliens Employment Act contain the details of the GATS Mode 4 commitments in the form of a textual copy. Important aspects, such as the service sectors to which the commitments for contractual service suppliers apply, are not explicitly listed. Moreover, the actual GATS obligations are therefore contained in policy guidance, which is absolutely inappropriate to implement binding international commitments.

Implementing services in Acts addressing access to the labour market

GATS Mode 4 service provision is implemented in a regime that regulates access to the labour market of the Netherlands for aliens. As such, relying on Mode 4 requires a work permit. This has an effect on the manner in which this form of liberalization is legally implemented, and it is likely that it has an effect on the administrative decisions related to the granting of such permits as well. Importantly, Dutch law imposes the concept of sponsorship to GATS Mode 4 service provision, which entails considerate administrative burdens. Breaches of sponsorship duties, which, due to the complexity of the legal rules, are not necessarily deliberate, may

5 Article 13 AA. The Aliens Decree (AD) only contains a delegation provision, Article 3.43(3)b AD; Article 6 Regulation Effectuating AEA.

lead to fines and loss of sponsorship. Fines apply to the other conditions in relation to the AEA as well, and there is a considerate practice of enforcement as can be evidenced in Dutch and EU case law.[6] These administrative and financial consequences are problematic on their own accord and are moreover exacerbated by their potential deterrent effect on the initial choice to rely on GATS Mode 4 mobility for service receivers (including companies wishing to utilize the ICT possibilities) in the Netherlands. With the introduction of sponsorship, this may lead to other severe consequences as companies relying on mobility may lose their trusted position as a sponsor when they breach these rules.

Implementation of EU obligations

There are few problems with the implementation of EU obligations derived from service trade liberalization. A main contributing factor in this regard is the simplicity of the rules, which in itself is a consequence of supremacy of EU law and its effective enforcement mechanism. EU citizens having a valid border-crossing document can only be refused entry to the Dutch territory on the basis of the under EU law defined justification grounds. For EEA citizens, the work permit regime simply does not apply. The main implementation problems relate to the posting of workers. The consequences of the *Essent* case for hiring-out services need to be transposed into Dutch law. The ECJ has clarified that the posting of workers concerns the freedom to provide services and the Netherlands has implemented this ruling. Consequently, the posting of workers no longer requires obtaining a work permit. The same change needs to be adopted in relation to hiring-out services. The only category of third-country nationals for which a work permit obligation may be imposed in cases concerning the hiring-out services of EU based companies are Croatian nationals. This is justifiable on be basis of the Act of Accession of Croatia and the specific suspension of the freedom of movement of workers.

It is recommendable to abolish the practice of restricting the freedom of movement of workers in relation to transition citizens. As is clear from national and EU case law, this requires a sharp distinction between the freedom of movement of service providers and the freedom of movement of workers. This suspension relates to fears over mass immigration, which have consistently proved unjustified. An alternative approach is to follow the example of Germany and Austria. These Member States have not only suspended the freedom of movement of workers in relation to Croatian nationals, they have restrict the posting of workers, as defined in the Posted Workers Directive, as well. Finally, Turkish service providers

6 The *Vicoplus* and Essent judgments are both cases concerning fines imposed by the Dutch labour inspectorate, Joined cases C-307/09, C-308/09 and C-309/09 *Vicoplus SC PUH, BAM Vermeer Contracting sp. zoo and Olbek Industrial Services sp. zoo v Minister van Sociale Zaken en Werkgelegenheid* ECLI:EU:C:2011:64; Case C-91/13 *Essent Energie Productie BV v Minister van Sociale Zaken en Werkgelegenheid* ECLI:EU:C:2014:2206.

must be admitted on the basis of the legal regime as it stood at the entry into force of the EU Association Agreement with Turkey. From a transparency perspective, it is therefore recommended to provide a legal regime containing the specific conditions that may be imposed in relation to Turkish service providers.

7.5.2 The United Kingdom

The UK Immigration Rules provide the conditions that apply to service providers who do not benefit from the EU regime. Most of the GATS Mode 4 categories are included in the Points-Based System, which is part of the Immigration Rules. The category of business visitors can be found in a separate paragraph of the Immigration Rules. Specific regulations provide the rules applying to EEA nationals, transition citizens, posted workers and Turkish nationals. As such, the Immigration Rules in general do not apply to those relying on EU law. The history of the creation of the PBS and its introduction reflect a clear shift in policy within UK immigration law and policy. The starting point was the replacement of existing migration schemes which were considered to be inflexible and too complex, yet this has changed to an immigration policy focused on crunching down immigration numbers.

The Immigration Rules and the points based system

Depending on nationality, entry to the UK requires leave to enter or entry clearance which involves obtaining a visa. Both need to be obtained outside the UK and require fulfilment of the conditions relating to the purpose of stay and certain general conditions relating to the individual may lead to refusal. This includes refusal based on prior imprisonment, medical grounds and earlier committed immigration related offences. The PBS tier 2 (intra-company transfers) implements the GATS ICT commitments, and tier 5 (temporary workers) implements the commitments relating to contractual service suppliers and, if such commitments are undertaken, independent professionals. The migrant wishing to rely on a certain entry purpose is required to obtain sufficient points in relation to attributes maintenance and English language. In effect, the conditions applying to entry on the basis of GATS Mode 4 commitments simply need to be fulfilled, as that will lead to the required points. The PBS relies on sponsorship. As with Dutch law, the company supporting the ICT or the receiver of the service need to act as sponsor. This requires a sponsorship licence, which in turn entails acceptance of information and record keeping duties. These duties are intrusive as they require sponsors to organize their human resources departments in a manner that is consistent with the sponsorship obligations. Failing to keep sponsorship duties may lead to fines and a downgrading or revoking of a sponsor's licence. Breaching immigration related rules will also have repercussions for future applications.

The UK GATS Mode 4 commitments and their implementation

Similar to Dutch commitments, the UK will not impose an economic needs test to the categories of service suppliers indicated in the horizontal commitment, a condition that is particularly troublesome from a market access perspective. No other effects seem to be discernible from the liberalization achieved under GATS. The full regime of a work permit obligation and sponsorship applies to the GATS Mode 4 entry routes, though this is not the case for the business visitors category.

Implementing errors

Similar issues with the implementation of GATS obligations as discussed under Dutch law can be discerned when it comes to UK implementation. The UK has implemented the GATS Mode 4 commitments in parallel with commitments derived from Free Trade Agreements, such as the EU – CARIFORUM Agreement. The current implementation leads to the suggestion that the contractual service suppliers category relates to GATS, while the independent professionals category would relate to the EU – CARIFORUM Agreement. This is not the case as both categories are part of both Agreements. The tier 5 Policy Guidelines needs to be brought in line with the reality of Mode 4 commitment categories. The PBS also indicates the use of genuineness tests, and extra tests in case of doubts and suspicions. A warning is therefore in order. A practice where service providers from certain countries would more often be targeted will infringe GATS Article VI which requires impartiality in relation to licence requirements. The tier 5 policy guidance indicates that where a migrant is not a direct employee, monitoring of a sponsor will be especially close. Such phrases are suspicious from the perspective of equal treatment. Problematic is the requirement that migrants entering the UK as contractual service suppliers, and if the current Doha Round offers are accepted, independent professionals need to be a national of the home country. This condition is not in conformity with the UK's GATS Mode 4 commitments and it needs to be removed. Oddly enough, UK implementation demonstrates the mirror image in comparison with Dutch implementation when it comes to business visitors. The purpose of setting up a commercial presence is not listed, whereas this is part of the Mode 4 commitment. Even if this activity can be interpreted in the activities that are listed, for the sake of clarity, setting up a commercial presence must be explicitly listed.

Complexity and use of policy guidance

The use of policy guidance creates flexibility and prevents that minor details have to be arranged through legislative procedures. However, the implementing

measures, the Immigration Rules, the PBS and the policy guidance are complex. On the one hand the issue of complexity is less problematic under UK law as under the Dutch system which involves two Acts, each consisting of four legislative levels. On the other hand, the complexity of the PBS is increased due to the frequent changes and the numerous transitory regimes in place. This complexity was explicitly recognized by the UK Court of Appeal. Similarly, the number of changes in rules and policy guidance are referred to as 'real obstacles to achieving predictable consistency (...) particularly in an area of law that lay people and people whose first language is not English'.[7]

Implementing services in Acts addressing access to the labour market

Similarly problematic is the implementation of GATS obligations in a framework also dealing with labour migration. The concept of sponsorship and the manner in which it is framed in UK law is difficult to apply to GATS Mode 4 mobility. Temporary service provision, in particular in relation to contractual service suppliers, and the possibly to be added independent professional category, is not a logical form of mobility to apply sponsorship to. UK sponsorship entails considerate administrate burdens, risk of fines and loss of sponsorship status. As indicated, this may potentially deter those wishing to rely on GATS Mode 4 commitments. The removal of the right to appeal with administrative appeal seems contrary to the GATS obligation requiring independent remedies for administrative decisions affecting trade in services. However, this limitation of appeal relates to immigration decisions, whereas the GATS does not affect measures regulating entry and temporary stay of natural persons.

Implementation of EU obligations

As with the Dutch provisions, EU law is implemented in a far more simple fashion. UK law provides for implementation through separate regulations addressing categories of those that may rely on EU law. The Immigration (European Economic Area) Regulations 2006 (EEA Regulations 2006) implement the rights of entry and residence of EEA nationals in accordance with the terms provided under EU law. As such, the implementation ensures supremacy of EU law. The implementation of the rights related to the posting of workers is all but simple. The implementation of the Posted Workers Directive was implemented in the form of an amendment to the Immigration (European Economic Area) Regulations 2000

7 *Hossain & Ors v Secretary of State for the Home Department* [2015] EWCA Civ 207, Lord Justice Beatson at par 30; *Pokhriyal v Secretary of State for the Home Department* [2013] EWCA Civ 1568; *Singh v Secretary of State for the Home Department* [2015] EWCA Civ 74.

(EEA Regulations 2000). This amendment was incorporated through the Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002 (Swiss Regulations 2002), without explicit indication that this regulation also addresses rights of posted workers. Adding to this complexity is the replacement of the EEA Regulations 2000 with the EEA Regulation 2006, without providing a clear codified version in which the definition of a posted worker was incorporated. Instead, the option of a 'saving' of the EEA Regulations 2000 was chosen. Consequently, the EEA Regulations 2000 and the Swiss Regulations 2002 were revoked, but not insofar as they apply the EEA Regulations 2000 to posted workers. This matter should be addressed in a less complicated manner. Additionally, the ECJ *Essent* judgment in relation to hiring-out services involving legally employed third-country nationals requires implementation. Hiring-out services involving third-country nationals may not be restricted, except through proportional information conditions relating to the legality of the posting.

Access to labour for transition citizens, i.e. Croatian nationals, is regulated in the Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013 (Accession Regulations 2013). Due to the UK restriction of the free movement of workers, Croatian nationals must obtain a worker authorization registration certificate. These certificates are granted if the conditions relating to employment on the basis of the Immigration Rules as they applied to third-country nationals on the 9th of December 2011. This is due to the standstill clause imposed in the Act of Accession of Croatia to the EU. The Accession Regulations 2013 contain a copy-paste error which requires revision, be it that the error actually leads to a more liberal regime than required by EU law. The current text indicates that in relation to all three forms of posting, posting of workers, hiring-out and ICT, Croatian nationals can rely on the exception to the authorization registration certificate. The suspension of the freedom of movement of workers in relation to Croatian nationals leads to conceptual difficulties due to claims of self-employment where the person in question is actually an employee (bogus self-employment), and the posting of workers where the situation actually involves the hiring-out of employees. The consequences of mistakes can be serious as possible sanctions relating to employment without authorization include fines and criminal offences.

The UK's accession on 1 January 1973 entails that the EC-Turkey Agreement applies to it and from that date Turkish service suppliers enjoy the effects of a standstill clause. The standstill clause relating to the self-employed does not grant a right of entry, but it does prevent the imposing of obligations introduced since its application. Consequently, the UK Turkish Business Person Visa is based on the requirements of the 1973 business provisions.

7.5.3 The legality of Dutch and UK immigration law and policy

So far, the provided conclusions are straightforward. However, the GATS contains several obligations that do not consist of norms which can be applied easily. As important, WTO and EU law are quite different when it comes to establishing a breach of provisions. This is evident from the differences when it comes to interpretation methods, as is immediately clear when comparing ECJ and Appellate Body cases.[8] Interpreting GATS obligations in relation to possible breaches requires restraint, and observance of the principle of *in dubio mitius*. When doubts exist in relation to the question if states have accepted certain international obligations, a restrictive interpretation should be adopted. At the same time, this is a legal study, and where international obligations do provide restrictions, such restrictions must be observed in the national legal order. This holds all the more true in relation to trade liberalization commitments undertaken on the basis of reciprocity. That being said, the overview presented above leaves two potential breaches of GATS obligations to be discussed. First, a case can be made that several conditions now imposed by Dutch and UK rules applying to Mode 4 movements are in violation of the adopted conditions. Second, a case can be made that the current implementation as a whole is not in conformity with the GATS obligation relating to transparency.

Additional conditions introduced since the Uruguay Round commitments

The starting point of the first analysis is that since the inscription of the Uruguay Round commitments, both the Netherlands and the UK have introduced a wide variety of conditions in their general regimes applying to migration. As such, sponsorship and all administrative requirements related to it and the UK general refusal ground relating to imprisonment will be investigated, as these form the most likely cases of a breach.[9] That some of these concepts lead to an increase of conditions imposed in relation to Mode 4 service suppliers is not in doubt. The need for a sponsor, or refusal of entry based on a one day prison sentence are clearly more stringent conditions in relation to providing services than those in

8 One needs only compare a ECJ case, for example the early cases where the Court establishes the principles of direct effect and supremacy, with the carefully built-up Appellate Body *China – Audiovisuals case*, a 170 pages long document with no less than 417 paragraphs, excluding Annexes; Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1; Case 106/77 *Amministrazione Delle Finanze Dello Stato Simmenthal* ECLI:EU:C:1978:49; *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (China – Publications and Audiovisual Products)* WT/DS363/AB/R, 21 December 2009.

9 In comparison, the Netherlands does attach consequences to previous criminal convictions in the form of a certificate of good conduct (*verklaring omtrent gedrag*) which is increasingly required. However, only relevant criminal conduct will lead to refusal of a certificate. Refusal in general (unrelated to the activity) will only be possible in relation to convictions relating to offences with a maximum penalty of 12 years imprisonment. Moreover, these conditions apply in general in the Netherlands and not just to migrants.

place at the time of inscription of the commitments (for Mode 4 1996). It must first be determined whether the new conditions are in contravention to GATS obligations. Next, the blanket reference provided in the commitments may include the adoption of new measures in relation to entry conditions and labour laws. Furthermore, these conditions might fall outside the scope of the measures addressed by the GATS, as they might relate to immigration rules. Finally, the GATS exceptions relating to the protection of public order may be relevant.

Sponsorship obligations

The EU GATS Mode 4 commitment applies to the market access obligation and to the national treatment obligation. The national treatment schedule simply refers to the categories of natural persons as provided in the market access column.[10] It is necessary to first assess the sponsorship obligations in terms of the GATS provisions. As a starting point the complete system of sponsorship does not contain any of the restrictions listed in the market access obligation of the GATS. In relation to the national treatment obligation, these measures do constitute additional requirements in comparison to domestic service suppliers. It is evident that relying on a GATS Mode 4 service supplier leads to the obligation within both legal orders to become a sponsor with all the administrative formalities attached to it. Additionally, from the view of a sponsor, sponsorship is a licensing procedure. Article VI of the GATS addresses such procedures, clearly with the intention to regulate the service itself. As such, the subject of Article VI should be licences and qualifications and standards that address the skill of the service provider, the quality of the service and minimum standards to be observed in service provision. Sponsorship licences are different, in a sense they privatize immigration control, leaving the initial verification of legality of the migrant to the sponsor. The state will then inspect post entry to ensure compliance with the rules. It also aims at a relationship of trust between sponsor and the government and a track-record of trustworthiness. While that may indeed fit with a multinational company regularly availing itself on ICT, it does not fit other categories of GATS Mode 4. The result is that sponsorship ill-suits those categories of GATS Mode 4 which do not relate to Mode 3. In any case, sponsorship is not a licence system of general application. This leads to the initial conclusion that applying sponsorship to GATS Mode 4 categories violates the national treatment obligation.

The fourth paragraph of the Annex MNP provides that the GATS 'shall not prevent a Member from applying measures to regulate the entry of natural persons in-

10 World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273, available online: <www.wto.org>. The additional limitations to national treatment relate to subsidies and diploma recognition, which is not relevant to sponsorship.

to, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment'. The single indication of the type of measures at stake is provided in the footnote which indicates that the 'sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment'. The question thus is whether all obligations imposed by sponsorship relate to the regulation of movement of natural persons into, or the temporary stay in, the Netherlands or the UK. Perhaps that a system of sponsorship indeed in essence regulates immigration, the form this system takes in the Netherlands and the UK seems excessive as it includes fees, extensive administrative obligations, information duties and sanctions in cases of non-compliance. Even if all the obligations relating to sponsorship do regulate the orderly movement of natural persons, a strong case can be made that the measures are applied in such a manner as to nullify or impair the benefits of the specific commitments. With perhaps the exception of ICT, it is unlikely that contractual service suppliers (or future independent professionals) are able to seriously compete with domestic service suppliers. The second paragraph of the Annex MNP indicates that the GATS does not apply to 'measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis'. As is apparent from the nature of sponsorship these exemptions are not at stake. This is evident from the fact that the conditions are imposed in relation to entry for Mode 4 service suppliers, as such they simply cannot serve as measures relating to employment, let alone citizenship, residence or employment on a permanent basis.

As to the exceptions to GATS obligations provided within that framework, a relevant grounds which may be relied upon by the Netherlands and the UK in relation to Mode 4 is the protection of public order in cases of a genuine and sufficiently serious threat posed to one of the fundamental interests of society.[11] While the public order exception does provide WTO Members with a considerable margin for regulatory autonomy, it seems unlikely that the sponsorship systems in both national legal orders relate to a genuine and sufficiently serious threat posed to a fundamental interest of society. Even if that were the case, the measures imposed are subject to a necessity test. As for the other listed grounds that upon first reading may seem relevant, sponsorship does not relate to securing compliance

11 The public morals ground does not seem relevant to this study. See for a thorough discussion on this ground JC Marwell 'Trade and Morality: The WTO Public Morals Exception after Gambling' 81 *New York University Law Review* May 2006, in particular p 815-815.

with laws or regulations adopted to prevent deceptive and fraudulent practices, or to deal with the effects of a default on service contracts. That ground addresses the service itself and is thus intended as a form of consumer protection in relation to the service receiver. The public morals ground moreover does not relate to the imposition of these conditions.

This leaves the issue of the blanket references included in the Uruguay Round commitments. The Uruguay Round Mode 4 commitments contain two of these references. Blanket references are limitations in commitments which do not expressly state their content but simply refer to an entire legislative Act or an entire policy. Such references are problematic. First, the duration of stay is defined by the Member States in relation to business visitors and ICT. Second, the commitments indicate that 'all other requirements of Community and Member States' laws, regulations and requirements regarding entry, stay and work and social security measures shall continue to apply'.[12] In theory, the legislator may change the duration at any moment, including a limitation to one day. In practice, this is exactly what has happened, as sponsorship and the refusal ground relating to imprisonment were introduced after the adoption of the commitments. On the other hand these blanket references may be seen as standstill clauses, incorporating the conditions as they stood at the moment of the inscription. To conclude otherwise would leave the commitments to be hollow indeed. Additionally, it seems logical that the blanket reference in relation to all laws, regulations and requirements regarding entry, stay and work and social security should be seen as merely ensuring equal treatment with nationals, a clear indication that GATS Mode 4 service provision needs to comply with the legislation of the host state. In any case, it is difficult to accept that the introduction of sponsorship and the tightening of entry conditions would have been accepted by those negotiating the Uruguay Round commitments, if they had realized that these were part of the commitments. A final indication is supplied by the EU Doha Round Mode 4 revised offer which has changed the blanket reference to: 'The service contract shall comply with the laws, regulations and requirements of the European [Union] and the Member State where the contract is executed.' This indeed seems to be an insurance of equality with national service providers. It therefore seems likely that the introduction of sponsorship, and its application to the GATS Mode 4 service providers constitutes a breach of obligations by the Netherlands and the United Kingdom.

Other conditions introduced, criminal convictions

The same analysis can be applied to any of the newly introduced conditions with Dutch and UK law. However, most of these conditions will likely relate to the carve-

12 The conditions relating to social security are only referred to in relation to contractual service suppliers.

out provided in the Annex MNP as they relate to immigration law. Nevertheless, this exception knows its limits. Taking the prior criminal conviction refusal ground as provided in UK law as the prime example, this indeed is clearly connected to regulating orderly entry. The issue with that measure is whether it should be regarded as nullifying or impairing benefits under a specific commitment. The most likely benefit again would be the national treatment obligation. From the perspective of the service provider, service provision in the UK may be refused on the basis of a one-day criminal conviction. Are such service providers in any sense not like service suppliers as domestic service providers? It seems unlikely. Consequently, this refusal ground seems to violate the national treatment obligation. The public order exception provided under the GATS is most relevant in relation to the refusal ground relating to prior imprisonment. While public order may be relevant, applying this exception to refusal on the basis of a history of one day imprisonment seems unlikely to be in conformity with the exception ground. This analysis may be different in relation to past convictions on the basis of serious crimes.

Transparency

Besides the specific problems caused by additional conditions introduced after accepting the Uruguay Round commitments, the current implementation as a whole seems to violate the GATS obligation relating to transparency. The implementation of GATS Mode 4 commitments have led to a hugely complex entry scheme in both the Netherlands and the UK. This runs counter to the spirit of the GATS, the facilitation and liberalization of service trade and the creation of a level playing field. While it is rather difficult to formulate such actions in terms of a breach of obligations, considering the purpose and the continuously increasing conditions and administrative burdens provided in national migration law and policy, there is little doubt that this is deliberate. The aim to curtail migration, and to crunch down numbers is expressly stated, again in relation to both states. While that is simply a matter of autonomy of those states, the same cannot be said in relation to GATS Mode 4 movements. The incorporation of these commitments in general schemes applying to labour migration leads these types of movements to be part of this constant tightening of entry conditions. This runs counter to the idea of inscribing binding commitments, and a case can be made that this in itself adds up to a violation of the nullification and impairment condition contained in the Annex GATS Mode 4. Additionally, it may lead to a violation complaint of the commitments, though it is difficult to pinpoint the exact obligation violated. This might leave the option of a non-violation complaint. The non-violation complaint might protect reasonable expectations related to commitments, and they may relate to nullification and impairment of rights and obligations through indirect circumvention. This is highly speculative as there is no case law available under the GATS.

Nevertheless, it is hard to shake the feeling that the Uruguay Round commitments are gradually reduced to an almost impossible to understand form of liberalization which requires an exercise of jumping through administrative hoops. Conditions that do seem viable are demanding proof of prior employment in relation to employed Mode 4 service providers. While this condition is not specifically added to the commitments, it is inherent to the obligation itself. Yet no indication at all is to be found in relation to the introduction of sponsorship in the Uruguay Round commitments. Considering the complexity of the topic service mobility, and considering the language used in the GATS relating to transparency, one would expect the opposite approach in the national legal order, clear entry schemes, simply listing the conditions agreed upon during the negotiations of the commitments coupled with available information. The only obligation in this regard, which explicitly recognizes this need is the requirement of an information contact point for developing country Members. This contact point, if at all present, clearly is hard to find. Reflecting on the picture provided in the national chapters, is this truly what WTO Member States had in mind when inscribing the commitments?

It is revealing that comparable hurdles in relation to the EU legal order like hiring-out, posting of workers and access for Turkish nationals, are consistently removed by the ECJ. While that difference can clearly be explained due to the different nature of the WTO and the EU, the current differences in relation to facilitation and transparency are staggering. Within the European Union, Member States must ensure that any hindrance to cross-border service provision is abolished, unless this hindrance is the least restrictive means to protect an interest of public interest. The achievement of a level playing field is further ensured through harmonization. As a consequence potential hindrances to competitive positions are removed as service providers encounter similar regulation when operating in another Member States. In contrast, dispute settlement and the enforcement of WTO obligations in cases of a breach of commitments is available to states only. This leads to odd results in relation to Mode 4 where the interested party in relation to ICT is a company of the state that has inscribed the commitment. This again reflects the failure to include a fair balance between interests of developing and developed countries.

7.6 Concluding analysis

The international ambition to liberalize trade in services is not reflected at the national level. Studying the national implementation of obligations relating to trade in services liberalization in the Netherlands and the UK reveals a striking contrast at three levels. First, the ambition expressed at the WTO level is absent at the national level. This in itself influences the ambition at the WTO level as the EU is re-

luctant to accept GATS Mode 4 commitments. The implementation of GATS obligations actually demonstrates the reverse of the expressed ambition as GATS Mode 4 service suppliers need to comply with a complicated administrative system imposing many unnecessary hurdles. The investigated Member States clearly are very reluctant to provide a transparent entry route for GATS Mode 4 service suppliers. Second, the ambition expressed at EU level is reflected at the national level, but only in relation to certain categories of natural persons enjoying mobility rights related to service provision. As such, the framework dealing with EEA nationals follows the logic adopted at the international level, which is that service trade liberalization requires a level playing field. The same cannot be said in relation to posted workers. Here, the investigated Member States again demonstrate a strong reluctance to accept the idea that service trade liberalization leads to the necessity of abolishing administrative hurdles in relation to legitimate employees of service providers. Similar resistance exists in relation to Turkish service providers and transition citizens. While the resistance of Member States to accept commitments relating to immigration law and labour market policies may be similar, EU law has overcome these resistances at the national level. The third contrast confirms the perceived tension between the recognition of the benefits of service trade liberalization, and the simultaneous reluctance to accept loss of sovereignty in relation to these policies. The investigated commitments and revised offers reveal reluctance to the acceptance of Mode 4 liberalization itself. The current and foreseeable future commitments are limited to the highly-skilled and are subject to various conditions and limitations. The result is that this form of service liberalization is virtually non-existent in the investigated Member States. As such, the importance of service trade liberalization is recognized, serious investments are made to achieve it, yet Mode 4 is almost void at the WTO level. Commitments that were accepted are further limited by administrative hurdles. Due to the implementation of service mobility obligations within general legislative frameworks, fears related to immigration and social dumping have a heavy influence on this topic. Admittedly, the WTO itself does not address this issue. However, these fears are clearly addressed in the EU commitments, and as long as the application of labour laws and collective agreements are ensured, such fears are unwarranted.

Comparing the manner in which EU law ensures compliance with the enforcement of WTO law leads to the following conclusion. The EU has a strong legal framework, with supremacy of EU law forming its core, providing enforcement opportunities from three angles. Firstly, the EU itself, in the form of the Commission, actively pursues violations of EU law. The infringement case law relating to the posting of workers is exemplary. Secondly, the subjects of the rights granted under EU law are granted with extensive judicial protection. Direct effect, consistent interpretation and state liability ensure that if rights are not correctly implemented, the individual can address the national courts of the Member States in-

fringing its rights. Thirdly, the Member States, including the administrative authorities, are obliged to apply EU law on their own accord. This includes obligations relating to transparency and clarity of applicable rules. Generally speaking, any measure liable to hinder cross-border service provision which is not objectively justified, must be removed. This requires replacement of all measures with a less intrusive rule from the perspective of the EU right granted. The result is that obstacles related to service mobility perceived in the national legal order, are overcome. As is apparent from the overview of the Dutch and UK immigration rules implementing GATS commitments, the hurdles relating to service mobility are firmly in place. GATS Mode 4 commitments have not led to a substantive change in relation to those obstructions. To the contrary, since the adoption of these commitments, the rules have become considerably more restrictive and much more complex, the introduction of sponsorship providing a striking example. This leads to the conclusion that in order to achieve its aim, the WTO needs to adopt a more similar approach as taken under EU law.

The Citizens Rights Directive and the Posted Workers Directive provide details as to what is required in relation to service mobility. In addition, the implementation of service trade mobility under EU law is greatly facilitated by its effective means of enforcement. Flanking measures and enforcement opportunities have an impact on the extent to which a level playing field is truly to be achieved. The details provided in the EU directives are not available under WTO law, while the obligations that do exist still require clarification or even completion. If GATS Mode 4 is to be taken seriously, this viewpoint should have important consequences for the approach of WTO Members towards increasing liberalization. Under WTO law a state must ensure the rights of Mode 4 service suppliers. Enforcement of GATS obligations is key as the here investigated WTO Member States do not take their GATS Mode 4 commitments seriously. Yet, enforcement opportunities under WTO law are limited. It is evident that the WTO differs greatly from the EU, and it is not realistic, nor desirable to propose the adoption of an equally effective enforcement mechanism. Nevertheless, the simple fact is that implementation of GATS Mode 4 commitments is effectuated in a manner difficult to formulate as a breach of GATS obligations, yet ultimately leaves them without much effect.

What may be needed to achieve such enforcement is conditions similar to those that led to the *US – Gambling* case, a WTO Member State's interest in a particular category of, in this case, a group of Mode 4 service suppliers. Additionally, as increased service mobility is estimated to benefit both home and host state, the investigated WTO Members are advised to unilaterally bring their implementation legislation towards the requirements imposed by the GATS.

A possible solution

The oddities relating to the application of the access to the labour market rules, as well as the application of sponsorship can be addressed by the creation of a specific GATS Mode 4 residence permit, as suggested by a group of WTO developing countries.[13] This permit would be conditional on the limitations provided in the GATS Mode 4 conditions. Applying general refusal grounds is ensured when the permit is included in the respective regimes applying to residence, while leaving the topic out of the regime applying to entry to the labour market. For the Netherlands this requires an implementation in the Dutch AA only, thus removing the work permit obligation. For the UK an implementation outside the PBS, as is currently the case with business visitors would suffice.

Final remarks

The central question addressed in this research was: how do states implement obligations to liberalize service mobility undertaken in a beyond state sovereignty context and how does this influence a state's interest to maintain control over its immigration and labour market policies?

International cooperation in the form of trade liberalization was the direct answer to the World Wars and the competitive strive in relation to international trade that greatly contributed to the outbreak of these wars. Both organizations aim at lasting peace through economic cooperation. In itself trade liberalization forms an important goal as well. The creation of the GATS is the reflection of a shift in the global economy from manufacturing industries to service-based industries. As such, the economic benefits of trade liberalization are now predicted to be achieved in relation to service liberalization. What has become evident is that an international framework dealing with service liberalization on a reciprocal basis needs to ensure service mobility. Failing to do so will not lead to a reciprocal outcome as specific trading partners have more to gain from modes of supply concerning service mobility or commercial presence than others. Liberalizing trade in services will be beneficial for all parties involved, be it that this liberalization must be truly reciprocal. Currently, the provided liberalization is biased in favour of developed states, as is recognized by those states. A close inspection of the Mode 4 commitments provided during the Uruguay Round and the revised offers provided during the Doha Round indicates that for the EU in general, and the Netherlands and the UK in specific, this bias remains strikingly clear.

13 The developing states are represented by India, requesting the creation of a GATS visa separate from the national rules applying to other forms of migration, see: <http://www.ilo.org/dyn/idea/ideasheet.display?p_idea_id=54> (last visited 1 October 2015).

To assess the impact of trade in services liberalization on immigration and labour market policies, the starting point is the demarcation of the economic activity of service provision from other economic activities as well as determining which form of service liberalization impacts on these policy areas. The defining element in relation to this demarcation in relation to labour lies in the temporary nature of service provision and in the absence of an employment relation. Though the criteria are clear enough they do lead to discussion as service provision includes the making available of labour. As such, the posting of workers, the hiring-out of workers and intra-company transfers are all forms of service provision as the employment relationship is not transferred and movements are of a temporary nature. As long as such situations do not entail entry to the labour market they should legally be distinguished from labour migration. This need is directly derived from the concept of service liberalization itself. In order to compete on the basis of a level playing field, service providers must be allowed to transfer their personnel to another state to perform the service. That service mobility is met with heavy resistance within the domestic legal order of the Netherlands and the UK can be explained by two interrelated conclusions. Firstly, the interests of the trade ministry is different from the interest of the ministry responsible for immigration and labour market policies. Secondly, states are clearly reluctant to accept international obligations in relation to those policies. Even without specific evidence, fears over mass-immigration, entry of unwanted immigrants, social dumping and a possible regulatory race to the bottom already place a heavy burden on the discussion surrounding services liberalization.

Nevertheless, service provision liberalization has led to binding international obligations that simply need to be implemented. Various implementation deficits were identified in this study. Additionally, the main consequence for the Netherlands and the UK is the requirement to accept that service liberalization goes hand in hand with service mobility. It is not possible to truly ensure the aims sought at WTO and EU level on the one hand, while restricting movement of natural persons related to service liberalization on the other. The analysis of the EU freedom of movement of service providers and GATS commitments leads to an important question that should be addressed by policy-makers in the Netherlands and the UK. Is the investment made at the international level, the reflection of this investment in the current and offered Mode 4 commitments and the manner in which the commitments are implemented really what Mode 4 is about? Is it truly necessary to speak of service liberalization in general and under the guise of the Doha Development Round, while only providing severely limited versions of movement for the highly-skilled?

As will be apparent from the outcome of this research, the viewpoint taken in this research is legal. Given that these binding international rules are derived from a transfer of sovereignty in the case of the EU, and a reciprocal set of com-

mitments under WTO law, Member States of both legal orders must either accept these consequences, or strive to change the international rules within the relevant international framework. Due to the concluded international agreements, service liberalization is a legal obligation, not a political choice. The movement of natural persons to provide services could have been left out of the GATS, yet WTO Members chose not to. This choice moreover is the result of a reciprocal agreement amongst WTO Member States. Service mobility does not lead to permanent stay or entry to the labour market. It does not lead to a right to rely on welfare system. If in reality this form of movement does have these consequences, that is a problem of implementing and enforcing the rules. The solution is not to create a complex bureaucratic system dealing with service mobility and ignoring adopted international obligations.

Samenvatting

De in dit proefschrift beschreven internationale liberalisering-stelsels richten zich mede op dienstenmobiliteit. Dit begrip omvat de rechten toegekend aan natuurlijke personen wanneer zij diensten verlenen om landsgrenzen te overschrijden en tijdelijk in het land waar de dienst verleend wordt te verblijven. Het toelaten van vreemdelingen met het oogmerk om economische activiteiten uit te voeren op het territorium van een staat heeft gevolgen voor de soevereiniteit van die staat ten aanzien van twee centrale beleidsterreinen, het migratiebeleid en het toelatingsbeleid van vreemdelingen op de arbeidsmarkt. Zowel de Wereldhandelsorganisatie (WTO), middels de algemene overeenkomst inzake de handel in diensten (GATS), als de Europese Unie (EU) beïnvloeden de vrijheid van een staat om migratie en toegang tot de arbeidsmarkt te reguleren. Dit zijn traditioneel beleidsterreinen waarbinnen staten terughoudendheid tonen ten aanzien van het accepteren van bindende internationale verplichtingen. Eén van de kerntaken van de staat is het vaststellen welke vreemdelingen toegang verkrijgen tot zijn grondgebied. Op een volgend niveau beslist de staat welke vreemdelingen toegang hebben tot zijn arbeidsmarkt en tot de verzorgingsstaat. Dit zijn precies twee beleidsterreinen die buiten het toepassingsbereik van de GATS vallen. De GATS is niet van toepassing op maatregelen welke de toegang van natuurlijke personen tot de arbeidsmarkt regelen, alsmede niet op maatregelen welke betrekking hebben op burgerschap of residentie. Daarnaast laat de GATS maatregelen welke de toegang tot het grondgebied en het tijdelijk verblijf tot het grondgebied van een WTO lidstaat regelen ongemoeid. Dit contrasteert met het Europees recht dat geen beperkingen op zijn toepassinggebied bevat ten aanzien van dit soort maatregelen. De interne markt omvat mede het vrij verkeer van werknemers, en het Europees recht erkent uitdrukkelijk de noodzaak om uitgebreide migratierechten toe te kennen aan diegenen die gebruik wensen te maken van de vrijheden van de interne markt. Zonder ongehinderde toegangs- en verblijfsrechten, inclusief migratierechten voor bepaalde vergezellende familieleden, zal het vrij verkeer in de praktijk niet bruikbaar zijn.

Daar de interne markt het hart van de Europese Unie vormt wordt deze noodzaak serieus genomen in de vorm van uitgebreide rechten en nauw gedefinieerde mogelijkheden voor de lidstaten om deze rechten te beperken. Europees recht geeft daarmee een duidelijk voorbeeld van het feit dat de liberalisering van dienstverlening, en het bereiken van een daadwerkelijk gelijkwaardig speelveld ten aanzien van concurrerende dienstverleners, noodzaakt tot het verlenen van diensten-

mobiliteit. De in dit onderzoek onderzochte secundaire regelgeving, de Burgerschapsrichtlijn en de Detacheringsrichtlijn, alsmede de uitgebreide effectueringen handhavingmogelijkheden verleend op basis van Europees recht, laten zien wat er voor nodig is om liberalisering van dienstverlening ten aanzien van de categorie dienstenmobiliteit te bereiken. Deze additionele regels, en het effectieve doorwerkingsmechanisme van Europees recht ontbreken ten aanzien van WTO recht. Het gevolg hiervan is dat er een inherente spanning te vinden is tussen de GATS en de daarin verankerde mobiliteit van natuurlijke personen (GATS vorm 4) en de wil van staten om soevereiniteit te behouden over het migratiebeleid en het toegang tot de arbeidsmarkt beleid. Deze spanning bestaat ook binnen de Europese Unie zoals duidelijk blijkt ten aanzien van dienstenmobiliteit met betrekking tot derdelanders en burgers van recent tot de EU toegetreden lidstaten. Dit spanningsveld schept het kader ten aanzien van de centrale vraag in dit onderzoek:

Hoe implementeren staten verplichtingen volgende uit de liberalisering van dienstenmobiliteit zoals deze zijn geaccepteerd in een voorbij staatssoevereiniteit context en op welke wijze beïnvloed dit het belang van een staat om controle te behouden over zijn migratie- en toegang tot de arbeidsmarktbeleid.

De twee elementen die deel uitmaken van deze spanning zijn onverenigbaar. Desondanks hebben de onderzochte EU lidstaten, Nederland en het Verenigd Koninkrijk (VK), een methode gevonden waarbij aan de ene kant bereidheid tot, en acceptatie van, de liberalisering teweeggebracht op grond van de GATS, terwijl controle op nationaal niveau behouden blijft. De implementatie van dienstenmobiliteit door deze staten komt neer op een kunstmatige opname van dat concept binnen hetzelfde juridisch kader waarmee permanente immigratie en arbeidsmigratie worden gereguleerd. Een volgende consequentie is dat de categorieën van dienstverleners welke door deze staten worden gezien als gunstig, denk hierbij aan bankiers, managers en soortgelijke individuen, inderdaad welkom zijn, terwijl dienstverleners met een lagere opleiding of met minder competenties buiten de deur worden gehouden. Tijdens de WTO onderhandelingen negeren onderhandelaars uit Nederland en het VK de realiteit van de methode waarop het Ministerie van Justitie en het Ministerie van Sociale Zaken en Werkgelegenheid in Nederland en in het VK het Ministerie van Binnenlandse Zaken omgaan met deze beleidsterreinen. Het resultaat is *inter alia* een zogeheten algemeen omvattende referentie (blanket reference) waarin de specifiek ingeschreven GATS verbintenissen (scheduled commitments) ondergeschikt worden gemaakt aan alle overige verplichtingen van EU recht of de wetten, regelgeving en voorwaarden van de lidstaten ten aanzien van toegang, verblijf, arbeid en sociale zekerheid. Geaccepteerde specifiek ingeschreven verbintenissen worden vervolgens genegeerd door de genoemde ministeries wanneer deze moeten worden geïmplementeerd, dit omdat op geen enkele

wijze een poging wordt gedaan om het verschil tussen bindende internationale verplichtingen ten aanzien van dienstenmobiliteit en alle overige vormen van economische immigratie tot uitdrukking te laten komen.

Ten aanzien van Europees recht houden dit soort tactieken geen stand. De Europese lidstaten hebben diverse pogingen ondernomen om soevereiniteit te behouden ten aanzien van de dienstenmobiliteit van derdelanders en van burgers van recent tot de EU toegetreden lidstaten. Het Hof van Justitie (HvJ) heeft consequent pogingen tot de toepassing van arbeidsmarkt regulering ten aanzien van gedetacheerde werknemers in strijd met het vrij verkeer van diensten verklaard. Hieronder valt ook het uitzenden van arbeidskrachten, hetgeen door het Hof wordt gezien als een vorm van dienstverlening. Het gevolg is dat de onverenigbaarheid van liberalisering van dienstenmobiliteit en behoud van soevereiniteit over het migratiebeleid en het toegang tot de arbeidsmarkt beleid duidelijk zichtbaar is geworden. Een vergelijking tussen de GATS en de EU vrijheid van dienstverleners geeft weer wat er gebeurt als liberalisering van dienstverlening serieus wordt genomen en wordt gesteund door een sterk mechanisme tot nakoming van verplichtingen.

Dit leidt tot de vraag waar het beschreven spanningsveld vandaan komt. Waarom streven de onderzochte EU lidstaten naar de liberalisering van de handel in dienstverlening en waarom accepteren zij daarbij de toevoeging van vorm 4 en dus van dienstenmobiliteit? Het antwoord op deze vraag is te vinden in de doelstelling van beide onderzochte internationale rechtsordes, namelijk het verzekeren van een blijvende vrede door middel van wederzijdse economische groei in de vorm van marktintegratie. Deze aanvankelijke doelstelling was gegrondvest op de gedachte dat marktintegratie zal leiden tot economische groei. Na verloop van tijd is economische groei een zelfstandig doel geworden ten aanzien van de liberalisering van de handel in dienstverlening. Waar dienstverlening aanvankelijk als de resterende tertiaire economische sector werd beschouwd, is dienstverlening tegenwoordig de grootste economische sector binnen de EU. Schattingen komen uit op een substantiële economische groei gerelateerd aan dienstenmobiliteit. Deze groei wordt nagestreefd op internationaal niveau, hetgeen verklaart waarom de EU en de lidstaten actief op zoek zijn naar, en bij voortduren investeringen maken in, het bereiken van liberalisering van dienstverlening binnen het kader van de WTO. Op nationaal niveau laten de onderzochte EU lidstaten een sterke neiging zien tot controle over mobiliteit van natuurlijke personen. Angst gerelateerd aan massa-immigratie, of ongecontroleerde immigratie, sociale dumping en een regulatieve race naar de bodem liggen ten grondslag aan deze neiging. Dit leidt tot de geïdentificeerde tegenstrijdigheid in de wijze waarop Nederland en het Verenigd Koninkrijk omgaan met dienstenmobiliteit.

WTO recht en de algemene overeenkomst inzake de handel in diensten

De GATS gaat uit van een geleidelijke totstandkoming van een gelijkwaardig speelveld ten aanzien van concurrerende dienstverleners. De daaruit volgende impact op het migratie- en toegang tot de arbeidsmarkt beleid wordt bepaald door het toepassingsbereik, de reikwijdte van de verplichtingen en de effectiviteit van het handhavingmechanisme van de GATS.

Het toepassingsbereik van de GATS

Het startpunt van de analyse van het toepassingsbereik van de GATS is de definitie van diensten en de onderscheiding van dat concept van andere economische activiteiten, binnen het kader van dit onderzoek, met name arbeid. Daar het concept diensten moeilijk te definiëren valt verschaft de GATS een definitie op basis van het concept handel in diensten volgens vier vormen van (dienst)verlening: grensoverschrijdende dienstverlening (vorm 1) waarbij de dienst zelf de grens over gaat, dienstontvangst in het buitenland (vorm 2) waarbij de ontvanger de grens over gaat, commerciële aanwezigheid (vorm 3) waarbij de dienstverlener werkt vanuit een nevenvestiging in een andere lidstaat en middels dienstenmobiliteit (mode 4) waarbij de dienstverlener zelf de grens over gaat. Liberalisering vindt plaats op basis van GATS verplichtingen ten aanzien van maatregelen van lidstaten welke de handel in diensten beïnvloeden. Hierbij ligt het accent op het verschaffen van toegang tot de markt voor buitenlandse dienstverleners, niet op deregulering.

De GATS bevat geen duidelijke aanwijzingen waar de scheidlijn tussen dienstverlening en arbeid ligt. Daar de GATS niet strekt tot liberalisering van mobiliteit van werknemers leidt dit mogelijk tot vergelijkbare problemen zoals die zich momenteel manifesteren binnen de EU met betrekking tot detachering van werknemers, en in het bijzonder uitzenddienstverlening. De GATS scheidlijn tussen vorm 3 en vorm 4, commerciële aanwezigheid en dienstenmobiliteit, is ook onduidelijk. Deze onduidelijkheid leidt niet tot problemen ten aanzien van ingeschreven vorm 4 verbintenissen onderzocht in deze studie. De inschrijving van aangegane verbintenissen is gebaseerd op de GATS inschrijving richtlijnen en de dienstensectoren classificatie lijst. Dit heeft tot gevolg dat de reikwijdte van de aangegane verplichting te vinden is in de ingeschreven verbintenissen. Zoals vastgesteld door de WTO-beroepsinstantie vormen de inschrijving richtlijnen supplementaire hulpmiddelen ten aanzien van interpretatie. Wanneer de inschrijving richtlijn niet worden gebruikt zou discussie kunnen ontstaan ten aanzien van specifiek ingeschreven verbintenissen en de reikwijdte van de definitie 'dienstverlening'. Ter voorkoming van dit soort discussies is het zeer raadzaam om de reikwijdte van vorm 4 ingeschreven verbintenissen duidelijk te omschrijven en nieuwe ingeschreven verbintenissen in overeenstemming met de dienstensectoren classificatie

lijst op te nemen. Het aangaan van vorm 4 verbintenissen met betrekking tot volledige dienstensectoren is nog ver weg, maar discussies met betrekking tot de scheidlijn tussen diensten, arbeid en commerciële aanwezigheid zullen ontstaan wanneer aangegane verbintenissen meer omvatten dan de huidige specifiek aangegeven categorie van dienstverleners ten aanzien van een specifiek aangegeven dienstensector. WTO lidstaten dienen ook duidelijk aan te geven wat de maximale duur van mode 4 dienstverlening is, aangezien de GATS zelf geen definitie geeft. De EU Uruguay ronde verbintenissen geven aan dat de categorie contractuele dienstverleners tot drie maanden toegang hebben tot het territorium van de ontvangende lidstaat. De andere categorieën zijn gelimiteerd tot een duur zoals gedefinieerd door de lidstaten, en waar deze er zijn, Unie maatregelen en richtlijnen met betrekking tot toegang, verblijf en arbeid. Het niet specifiek definiëren van de maximale duur van dienstverlening in de aangegane verplichting is hoogst onwenselijk daar dit tot onduidelijkheid leidt. Sinds 2001 zijn onderhandelingen gaande in het kader van de WTO Doha ronde. De EU Doha ronde herziene biedingen, de specifieke verbintenissen welke de EU ter onderhandeling heeft aangeboden aan de overige WTO lidstaten, bevatten inderdaad een specifiek aangegeven maximale duur voor alle aangeboden categorieën. Aangezien onderhandelingsbiedingen niet bindend zijn dienen deze specificaties behouden te blijven totdat de Doha ronde succesvol is afgerond.

Het huidige niveau van vorm 4 liberalisering is bepaald door de Uruguay ronde specifieke verbintenissen en de daarna nog doorgevoerde onderhandelingen ten aanzien van vorm 4. De extra vorm 4 onderhandelingen eindigden in 1996 en waren bedoeld om de magere en, vanuit ontwikkelingslanden perspectief, niet gebalanceerde vorm 4 verbintenissen van de Uruguay ronde uit te breidden. De opname van zowel vorm 3 als vorm 4 in de GATS is het gevolg van een compromis tussen ontwikkelde landen enerzijds en ontwikkelingslanden anderzijds. Ten aanzien van vorm 4 is geen enkele restrictie opgenomen ten aanzien van opleiding of competenties. De resultaten van de Uruguay ronde ten aanzien van vorm 4 waren echter voornamelijk gericht op dienstensectoren waarbij de dienstverlener een hoog opleidingsniveau nodig heeft. Bovendien waren de verbintenissen gericht op zakelijke bezoekers en intra-concern overplaatsingen, vorm 4 categorieën welke in hoge mate samenhangen met commerciële aanwezigheid. De na de Uruguay ronde doorgaande vorm 4 onderhandelingen hebben uiteindelijk weinig gedaan aan de ongebalanceerde uitkomst van de Uruguay ronde. Een gedetailleerd onderzoek naar de Doha ronde en de in het kader daarvan aangeboden EU verbintenissen laat weinig veranderingen zien. Twee nieuwe categorieën vorm 4 dienstverleners, zakelijk stagiairs en onafhankelijke professionele dienstverleners worden aangeboden, maar wederom onder zeer stringente voorwaarden.

De GATS verplichtingen en uitzonderingen

De GATS legt algemene en specifieke verplichtingen op aan de lidstaten. De algemene verplichting die relevant is om de impact van GATS vorm 4 verplichtingen ten aanzien van nationaal migratierecht en het recht op toegang tot de arbeidsmarkt te toetsen is de verplichting tot transparantie. Transparantie kan gezien worden als één van de centrale kenmerken van de GATS. Regelgevings- en taalverschillen kunnen tot ernstige barrières leiden voor dienstverleners, en dienstverlening is vaak onderhevig aan veel regelgeving. De consequentie is dat het doorgronden van een buitenlands rechtssysteem lastig kan zijn. Ook het doorgronden van toegangsregels, verblijfsregels en regels met betrekking tot arbeidsmarkt toegang voor vreemdelingen is lastig. Mobiliteit van natuurlijke personen in het kader van dienstverlening vereist de nakoming van verscheidene rechtsregels op nationaal niveau. Gevolg hiervan is dat transparantie extra belangrijk is ten aanzien van vorm 4 liberalisering, met name voor dienstverleners die geen uitgebreide capaciteit hebben om deze regels in andere lidstaten te doorgronden (midden- en kleinbedrijf en individuele dienstverleners). Voor het bereiken van daadwerkelijke toegang tot de markt is transparante regelgeving noodzakelijk. Daarnaast is transparantie van belang tijdens de onderhandelingen van nieuwe specifieke verbintenissen aangezien de onderhandelaars daardoor een overzicht hebben van de handelsbarrières waarop een specifiek verzoek tot liberalisering zich kan richten. Concreet houdt de transparantie verplichting publicatie- en notificatieverplichtingen in, alsmede verplichtingen ten aanzien van administratieve procedures.

Specifieke verbintenissen dienen te voldoen aan de markttoegangverplichting, de nationale behandeling verplichting en delen van de binnenlandse regelgeving verplichting. De combinatie van deze verplichtingen zorgt voor markttoegang tot een dienstensector, een gelijk speelveld voor concurrerende dienstverleners en de afschaffing van onnodige niet-discriminatoire binnenlandse regelgeving. Ten aanzien van vorm 4 richt markttoegang zich op quota ten aanzien van werkvergunningen en een prioriteitgenietend aanbod toets. De binnenlandse regelgeving verplichting richt zich op administratieve procedures zoals licenties, kwalificaties en technische eisen met betrekking tot dienstverlening. Deze GATS bepaling heeft nog niet zijn definitieve vorm omdat de lidstaten het tijdens de Uruguay ronde niet eens konden worden over de mate waarin deze verplichting invloed heeft op de regelgevende autonomie. Onderhandelingen daarover vinden nog plaats in de vorm van aanvullende eisen ten aanzien van binnenlandse regelgeving. De uiteindelijke tekst kan neerkomen op een verbod op onnodige regelgeving en een rechtvaardigingstoets op basis van gelegitimeerde doelstellingen. Dit kan ook de vorm aannemen van een toets van de minst belemmerende maatregel. In de tussentijd gelden tijdelijke eisen ten aanzien van licenties, kwalificaties en technische eisen. De impact van deze tijdelijke binnenlandse regelgeving verplichting is onduidelijk

en kan neerkomen op een standstill bepaling of komt neer op een complexe inschatting van de verwachtingen waarop lidstaten mocht vertrouwen toen deze bepaling in werking trad in januari 1996. Zolang de uiteindelijke omvang van de binnenlandse regelgeving verplichting onduidelijk is het onverstandig om nieuwe specifieke verbintenissen aan te gaan, aangezien deze verbintenissen daar mede door worden bepaald. De afronding van de onderhandelingen met betrekking tot de aanvullende eisen ten aanzien van binnenlandse regelgeving binnen het kader van de Doha onderhandelingen is dan ook zeer raadzaam.

De GATS omvat een aantal mogelijkheden op grond waarvan WTO lidstaten niet gehouden zijn aan de aangegane verplichtingen, inclusief de specifieke verbintenissen. Van de algemene uitzonderingen is de openbare orde exceptie het meest relevant ten aanzien van mobiliteit van natuurlijke personen. De Annex mobiliteit van natuurlijke personen bevat specifieke uitzonderingen ten aanzien van vorm 4. De GATS heeft geen betrekking op arbeidsmobiliteit en is ook niet van toepassing op maatregelen welke de toegang van natuurlijke personen tot de arbeidsmarkt regelen, alsmede niet op maatregelen welke betrekking hebben op burgerschap of residentie. Ook toegang tot het grondgebied en het tijdelijk verblijf tot het grondgebied van een WTO lidstaat valt buiten het toepassingsbereik van de GATS. Een belangrijke uitzondering is echter dat dit soort maatregelen niet mogen worden toegepast op een wijze waardoor de specifieke verbintenissen worden tenietgedaan of ernstig worden uitgehold.

Handhavingsmogelijkheden

Het WTO geschillenbeslechtingsysteem biedt rechtsbescherming ten aanzien van een inbreuk klachten en een niet-inbreuk klachten. Deze laatste variant heeft tot nog toe geen rol gespeeld in GATS rechtspraak maar zou voor het hier onderzochte onderwerp een mogelijkheid kunnen bieden tot klachten op basis van tenietgedane gerechtvaardigde verwachtingen ten aanzien van aangegane specifieke verplichtingen. Geschillenbeslechting is alleen beschikbaar voor WTO lidstaten. Natuurlijke personen en bedrijven zijn afhankelijk van hun eigen staat om op te treden tegen schendingen van de GATS. Vorm 4 verbintenissen lijken zich daar slecht voor te lenen vanwege de sensitiviteit van het onderwerp en zeker niet ten aanzien van inbreuken op de rechten van individuele dienstverleners of die van midden- en kleinbedrijf. De in dit onderzoek vastgestelde inbreuken zullen waarschijnlijk niet snel onderzocht worden op grond van WTO geschillenbeslechting. Dit klemt des te meer daar een aantal GATS verplichtingen onduidelijk zijn en uitwerkingen van de geschonken vorm 4 rechten ontbreken (zoals wel het geval is ten aanzien van EU rechten in de vorm van secundaire regelgeving).

EU vrij verkeer van dienstverleners

De interne markt vormt het hart van het Europese integratieproject. De interne markt voor de handel in diensten heeft het niveau bereikt waar dienstverleners uit andere lidstaten onder dezelfde voorwaarden kunnen opereren als voor binnenlandse dienstverleners geldt. Het doel is een gelijk speelveld voor concurrerende dienstverleners. Dit vereist het afschaffen van onnodige belemmeringen voor de handel en de coördinatie van de wetgeving van de lidstaten.

Het toepassingsbereik van de EU vrij verkeer van dienstverleners

Het Verdrag betreffende de Werking van de Europese Unie geeft geen scherpe definities van diensten of dienstverlening. De onderscheidende criteria voor deze begrippen zijn gerelateerd aan de andere fundamentele vrijheden zoals verder uitgewerkt door het Hof van Justitie. Dienstverlening is het zelfstandig uitvoeren van een economische activiteit welke normaal geschiedt tegen vergoeding. Het onderscheidend kenmerk met betrekking tot arbeid vormt de zelfstandigheid en met vestiging het tijdelijk karakter van de dienstverlening. De EU vrijheid van dienstverlening is van toepassing op onderdanen van landen die deel uitmaken van de Europese Economische Ruimte. Binnen deze categorie kunnen restricties opgelegd worden aan onderdanen van recent toegetreden lidstaten ten aanzien van uitzenddienstverlening aangezien voor hen het vrij verkeer van werknemers tijdelijk niet geldt wanneer lidstaten daar voor kiezen. Echter, detachering van dergelijke onderdanen mag slechts worden onderworpen aan enkele lichte verificatiemaatregelen daar detachering niet leidt tot toegang tot de arbeidsmarkt. Ook op grond van associatieakkoorden, waarvan het akkoord met Turkije in dit onderzoek het voorbeeld vormt, zijn rechten toegekend aan dienstverleners. Ten aanzien van Turkse dienstverleners geldt een standstill bepaling waardoor op hen het recht zoals dat van toepassing was in 1973 van toepassing is. Nieuwe beperkingen mogen niet worden toegepast.

De EU verplichtingen en rechtvaardigingsgronden

Alle belemmeringen welke de handel in diensten kunnen hinderen, inclusief potentiële belemmeringen zijn verboden tenzij deze objectief kunnen worden gerechtvaardigd. Rechtvaardiging houdt een volwaardige toetsing aan het evenredigheidsbeginsel in, inclusief een verbod op maatregelen wanneer een legitieme doelstelling door minder beperkende alternatieven kan worden bereikt. Deze negatieve integratie wordt geflankeerd door positieve integratie ten aanzien van migratierechten in de vorm van de Burgerschapsrichtlijn. EU rechten ten aanzien van de detachering van werknemers door dienstverleners is uitgewerkt in de Detache-

ringsrichtlijn. De Dienstenrichtlijn werkt de markttoegangsrechten van dienstverleners uit. Echter, de Dienstenrichtlijn bevat verscheidenen uitzonderingen ten aanzien van diens bereik, waaronder arbeidsrecht, sociale welvaart en detachering. Gevolg is dat de Dienstenrichtlijn niet van toepassing is op het in dit boek onderzochte onderwerp. De discussies gevoerd ten tijde van de totstandkoming van deze richtlijn zijn daarentegen wel relevant omdat het voorgestelde controle door de thuisstaat onacceptabel bleek te zijn uit angst voor *inter alia* sociale dumping.

Handhaving van EU recht

EU rechten zijn bijzonder effectief af te dwingen als gevolg van het uitgebreide EU stelsel van implementatie en handhaving. Voorrang, directe werking, conforme interpretatie en staatsaansprakelijkheid, alsmede de mogelijkheden voor de Commissie om een inbreukprocedure te starten vormen onderdelen van dit effectieve mechanisme. Daarnaast hebben rechters en de autoriteiten van de lidstaten zelfstandig de plicht om inbreuken op EU recht te voorkomen. In een zeer beperkte vorm ondervindt het WTO recht voordelen van dit EU mechanisme. Ten eerste is dit het geval wanneer WTO recht wordt omgezet in EU recht en ten tweede wordt WTO recht conforme interpretatie ingezet door het Hof van Justitie. Echter, directe werking en staatsaansprakelijkheid van WTO recht heeft geen plaats gekregen binnen het EU recht, met uitzondering van de *Nakajima* en *Fediol* uitspraken.

Nederlandse mode 4 verbintenissen en implementatie

De GATS vorm 4 verbintenis houdt in dat Nederland geen prioriteitgenietend aanbod toets zal toepassen ten aanzien van de opgenomen categorieën dienstverleners in de horizontale verbintenissen. Dit is een significante verbetering van markttoegang. Dit is echter het enige gevolg van de aangegane verbintenis aangezien alle andere voorwaarden, inclusief een tewerkstellingsvergunning en de noodzaak van een referent ongewijzigd blijven.

De implementatie van de GATS verbintenissen is verwarrend en bevat fouten, in de eerste plaats ten aanzien van de indeling in categorieën vorm 4 dienstverleners. De indeling in de GATS verbintenis is anders dan de indeling in de implementatie en dit dient te worden gecorrigeerd. Daarnaast is ten aanzien van de zakelijke bezoeker categorie de mogelijkheid om in Nederland dienstencontracten te onderhandelen in het geheel niet omgezet.

Complexiteit en het gebruik van beleidsregels

Om de implementatie van de GATS verbintenissen te kunnen begrijpen is het noodzakelijk om de Vreemdelingenwet en de Wet arbeid vreemdelingen en de drie

verdere delegatielagen van deze wetten te bestuderen. De GATS verbintenissen worden geheel niet genoemd, met uitzondering van de beleidsregels behorende bij de Wet arbeid vreemdelingen. Het betreft bovendien een tekstuele overname waarin fouten worden gemaakt. Belangrijke zaken zoals de specifieke sectoren ten aanzien waarvan de liberalisering heeft plaatsgevonden worden niet expliciet genoemd. Een dergelijke implementatie op het delegatieniveau beleidsregels is volstrekt niet toepasselijk voor internationale verplichtingen.

Implementatie van dienstenmobiliteit in arbeidsmarkttoegang wetgeving

De GATS vorm 4 verplichtingen zijn omgezet in de Wet arbeid vreemdelingen, een wet die de toegang tot de Nederlandse arbeidsmarkt reguleert. Dit heeft gevolgen voor de manier waarop tegen vorm 4 wordt aangekeken aangezien daar nu een tewerkstellingsvergunning voor nodig is. Dit heeft waarschijnlijk ook gevolgen voor de manier waarop de autoriteiten met vorm 4 verzoeken omgaan. Gevolg is ook dat het referentschap van toepassing is, terwijl deze verplichting niet goed past ten aanzien van dienstverlening. Overtreding van de regels kan leiden tot boetes en intrekking van vergunningen, hetgeen een afschrikkende werking heeft op het gebruik van vorm 4 dienstverleners.

Implementatie van EU verplichtingen

Ten aanzien van de implementatie van het vrij verkeer van dienstverleners op grond van Europees recht zijn weinig problemen te ontwaren. Dit komt vooral door de eenvoud van de implementatiewetgeving, hetgeen weer samenhangt met de voorrang van EU recht. Problemen ontstaan vooral ten aanzien van detachering. Zo heeft het enige tijd geduurd voordat het Nederlandse recht in overeenstemming werd gebracht met de regels met betrekking tot detachering van derdelanders en onderdanen van recent toegetreden EU lidstaten. De consequenties van de *Essent* uitspraak van het Hof van Justitie zijn dat dienstverleners die derdelanders beschikbaar stellen als uitzendkracht onder het vrij verkeer van diensten vallen. De consequentie is dat enkel lichte controlemaatregelen mogen worden toegepast. Dit geldt niet voor onderdanen van recent toegetreden EU lidstaten aangezien Nederland ten aanzien van deze categorie een beroep kan doen op de Akte van toetreding (in 2015 enkel ten aanzien van onderdanen van Kroatië).

Het is raadzaam om de neiging om het vrij verkeer van werknemers tijdelijk te beperken ten aanzien van onderdanen van recent toegetreden EU lidstaten te onderdrukken. Omdat het zeer lastig is een grens te trekken tussen het vrij verkeer van werknemers en het vrij verkeer van dienstverleners leidt dit tot veel verwarring en rechtspraak.

Voor Turkse dienstverleners geldt het wetgevingsregime zoals dat bestond ten tijde van de inwerkingtreding van het Associatieverdrag met Turkije. Vanuit het oogpunt van transparantie is het wenselijk om dit regime daadwerkelijk in de wetgeving op te nemen.

De Verenigd Koninkrijk vorm 4 verbintenissen en implementatie

GATS vorm 4 verbintenissen zijn opgenomen in het Points-Based System. Gelijk aan de Nederlandse algemene verbintenissen houdt vorm 4 voor het VK de afschaffing van een prioriteitgenietend aanbod toets in. Een vergelijking van de vorm 4 verplichtingen met het PBS laat zien dat er geen echte gevolgen zijn van de GATS liberalisering op de nationale regels. De tewerkstellingsvergunning en de noodzaak van een sponsor zijn volledig van toepassing. Ten aanzien van de implementatie gelden soortgelijke problemen als vastgesteld bij de Nederlandse implementatie. Het VK heeft enkele verplichtingen onjuist omgezet en deze dienen te worden aangepast. Saillant detail is daarbij dat ten aanzien van de zakelijke bezoekers een precies omgekeerd gebrek aanwezig is als bij de Nederlandse implementatie. Het VK heeft, in tegenstelling tot Nederland het doel van de onderhandeling van een dienstencontract wel opgenomen, maar het bezoek voor het opzetten van een nevenvestiging is niet opgenomen.

Complexiteit en het gebruik van beleidsregels

Het PBS is qua indeling overzichtelijk, aangezien slechts sprake is van wet en beleidsregels. Bovendien zijn de vorm 4 categorieën omgezet in duidelijke onderdelen van het PBS. Echter, de vele kleine en grote wijzigingen van het PBS maken het systeem wel complex. Ook de implementatie van vorm 4 door het VK vindt deels plaats door middel van beleidsregels. Dit is op grond nationaal rechtspraak al eens veroordeeld met expliciete verwijzing naar de noodzaak om regelgeving overzichtelijk te houden voor personen waarvan Engels niet de moedertaal is.

Implementatie van dienstenmobiliteit in arbeidsmarkttoegang wetgeving

Gelijk de Nederlandse situatie is de implementatie van GATS verbintenissen in een wetsysteem dat zich richt op arbeidsmigratie problematisch. De noodzaak van een sponsor is niet goed toe te passen op alle categorieën van vorm 4 dienstverlening. Ook nu zijn boetes en intrekking van vergunningen mogelijk bij overtreding hetgeen een afschrikkende werking heeft op het gebruik van vorm 4 dienstverleners.

Implementatie van EU verplichtingen

De implementatie van EU recht is in vergelijking met de GATS verbintenissen zeer eenvoudig. De immigratieregels en het PBS is niet van toepassing. In plaats daarvan gelden specifieke regelingen ten aanzien van EER onderdanen, detachering, onderdanen van recent toegetreden lidstaten en Turkse onderdanen. De terminologie in deze regelingen sluit aan dij de EU definities waarmee de voorrang van EU recht is gewaarborgd. Daarentegen is de implementatie ten aanzien van detachering allesbehalve overzichtelijk. Wijzigingen in intussen ingetrokken regelingen waarbij de detacheringsbepalingen behouden zijn maken het er niet eenvoudig op. Bovendien moet ook het VK de gevolgen van de *Essent* uitspraak implementeren.

De wettigheid van het Nederlandse en VK migratierecht en beleid

Tot zover zijn de getrokken conclusies overzichtelijk. Problematisch is dat de GATS verscheidene verlichtingen bevat welke niet terug te brengen zijn tot eenvoudig toepasbare normen. Even belangrijk is het feit dat WTO- en EU-recht zeer verschillend zijn wanneer het aankomt op het vaststellen van eventuele inbreuken. Uiteraard is de nodige voorzichtigheid geboden ten aanzien van het vaststellen van inbreuken ten aanzien van WTO-recht. Desondanks is de omzettingswetgeving van Nederland en het VK dusdanig dat het goed verdedigbaar is om te concluderen dat deze omzettingswetgeving niet voldoet aan de specifiek aangegane GATS verbintenissen. Daarnaast is het verdedigbaar om te stellen dat de implementatie in zijn algemeenheid een inbreuk maakt op de verplichting tot transparantie.

Aanvullende eisen geïntroduceerd sinds de Uruguay ronde verbintenissen

Sinds de inschrijving van de specifieke Uruguay ronde verbintenissen hebben zowel Nederland als het VK verscheidene nieuwe voorwaarden opgenomen in hun migratierecht. De noodzaak tot het hebben van een sponsor en alle daarmee samenhangende administratieve verplichtingen, alsmede de VK algemene weigeringsgrond ten aanzien van personen met een strafrechtelijke veroordeling vormen hierbij de voorbeelden. Dat deze nieuwe voorwaarden tot een toename leiden ten aanzien van strengere verplichtingen ten opzichte van 1996 waaraan een vorm 4 dienstverlener moet voldoen staat buiten twijfel. De wettigheid van deze voorwaarden hangt dus af van de vraag of hiermee een inbreuk op GATS verplichtingen wordt gemaakt. Vervolgens dient te worden onderzocht of deze voorwaarden passen binnen de in de specifieke verbintenissen opgenomen algemeen omvattende referentie. Het is ook mogelijk dat de genoemde voorwaarden buiten het GATS toepassingsbereik vallen, zoals vormgegeven in de Annex MNP, aangezien

de voorwaarden te zien kunnen zijn als regels behorende bij het migratierecht. Tenslotte kan een algemene GATS uitzonderingsgrond van toepassing zijn, waarbij de openbare orde exceptie relevant kan zijn.

Referentschap / sponsoring

De horizontale GATS vorm 4 verbintenis geldt zowel voor de markttoegangverplichting als de nationale behandeling verplichting. De verplichting voor vorm 4 dienstverleners om een sponsor te hebben is niet terug te brengen tot één van de verboden maatregelen genoemd in de markttoegangverplichting. Met betrekking tot de gelijke behandelingsverplichting is het duidelijk dat een beroep doen op een vorm 4 dienstverlener door de sponsorverplichting tot veel meer administratieve verplichtingen leidt dan gelden voor het gebruik van binnenlandse dienstverleners. Vanuit het oogpunt van de sponsor, de dienstontvanger, is bovendien sprake van een licentieprocedure. De binnenlandse regelgeving verplichting van de GATS heeft betrekking op dit soort procedures, maar daarbij is de intentie vooral om de dienstverlening zelf te reguleren. Het gaat daarbij vooral om de kwaliteit van de dienstverlener, de dienst en standaarden welke in acht moeten worden genomen. Een sponsorvergunning is anders omdat het daarbij in essentie gaat om de privatisering van migratierecht. De sponsor krijgt verplichtingen om zorg te dragen voor de wettigheid van het verblijf van de migrant. De staat past vervolgens controles toe. In ieder geval is de sponsorverplichting geen algemeen geldende maatregel, aangezien deze enkel wordt toegepast ten aanzien van buitenlandse dienstverleners. Daarmee staat de mogelijke inbreuk om de non-discriminatie eis van de nationale behandeling verplichting vast.

De Annex MNP geeft aan dat de GATS niet in de weg staat aan immigratieregels, tenzij deze regels een specifieke verbintenis wordt tenietgedaan of ernstig wordt uitgehold. De vraag is dan of alle verplichtingen behorende bij sponsoring samenhangen met het regelen van toegang en verblijf van personen in Nederland en het VK. Mogelijk dat de essentie van dit systeem inderdaad toeziet op het ordelijk verloop van migratie. De gekozen vorm lijkt daarbij excessief belastend aangezien het gaat om vergoedingen, uitgebreide administratieve verplichtingen, informatieverplichtingen en boetes bij overtreding van de (zeer complexe) regels. De introductie van sponsoring zal ook niet passen binnen de in de Annex MNP genoemde uitzondering betrekking hebbende op toegang tot de arbeidsmark, en zeker niet met betrekking tot het verkrijgen van burgerschap en verblijf op permanente basis. Dit blijkt alleen al uit het feit dat deze regels ook van toepassing zijn op vorm 4, waarbij geen sprake is van toegang tot de arbeidsmarkt of permanent verblijf.

Met betrekking tot de algemene excepties van de GATS, de grond openbare orde hangt samen met een daadwerkelijke en ernstige dreigen met betrekking tot

een fundamenteel belang van de maatschappij. Het lijkt onwaarschijnlijk dat sponsorschap, zoals dat van toepassing is in beide lidstaten, inderdaad een dergelijk doel dient.

De Uruguay ronde verbintenissen bevatten twee algemeen omvattende referenties, waarbij in het algemeen wordt verwezen naar volledige wetten of beleidsterreinen. Dit soort verwijzingen zijn zeer problematisch. Het is onduidelijk of een dergelijke verwijzing inhoudt dat de genoemde verplichtingen in de referentie gevormd worden door de verplichtingen op het moment van inschrijving, hetgeen neerkomt op een standstill bepaling. De andere optie is dat de referentie verwijst naar de wetten en het beleid zoals dat nu geldt. Dit zou betekenen dat een lidstaat met een simpele wetswijziging de inhoud van een specifieke verbintenis behoorlijk kan uithollen. Dit lijkt ook precies hetgeen te zijn dat is gebeurd met betrekking tot de specifieke Nederlandse en VK verbintenissen, immers, in vergelijking met 1996 dient de vorm 4 dienstverlener nu ineens te voldoen aan uitgebreide verplichtingen op grond van sponsoring. Het is evident dat hiermee de concurrentiepositie nogal verzwakt is. Dit kan niet de intentie zijn van de aangegane specifieke verbintenissen, zeker niet gezien de wederkerigheid van de onderhandelingen waar deze verbintenissen uit voort komen. Bij gebreke aan houvast gegeven op grond van WTO geschillenbeslechting lijkt de conclusie dan ook te zijn dat deze nieuwe eisen een inbreuk maken op de GATS.

Andere voorwaarden, strafrechtelijke veroordelingen

Dezelfde analyse kan worden losgelaten op alle nieuwe voorwaarden en verplichtingen geïntroduceerd door Nederland en het VK. Echter, de meeste van deze voorwaarden zullen passen binnen de excepties van de Annex MNP aangezien zijn samenhangen met migratierecht. Maar deze excepties zijn uiteraard begrensd. Strafrechtelijke veroordelingen, zoals deze een weigeringsgrond vormen in het recht van het VK is daarvan een duidelijk voorbeeld. Deze grond hangt duidelijk samen met de migratierecht exceptie, daar het gaat om het waarborgen van ordelijke toegang tot het VK. De vraag is dan, wordt hiermee een specifieke verbintenis teniet gedaan of significant uitgehold. Opnieuw is de maatregel mogelijk in strijd met de nationale behandeling verplichting. Vanuit het standpunt van de dienstverlener gezien kan dienstverlening in het VK worden geweigerd op basis van een strafrechtelijke veroordeling van één dag gevangenisstraf. Een vergelijking tussen dienstverleners waarbij het enige verschil is dat bij de ene geen sprake is van een strafrechtelijke veroordeling van één dag gevangenisstraf, met dienstverleners waarbij dat wel het geval is zal zeer waarschijnlijk neerkomen op het oordeel dat deze dienstverleners gelijkwaardige diensten verlenen. Daarmee vormt deze bepaling een inbreuk op de nationale behandeling bepaling. De openbare orde exceptie is hierbij eventueel relevant, maar het niet toelaten van personen met een dergelij-

ke strafrechtelijke veroordeling zal niet samenhangen met een ernstige bedreiging van een fundamenteel belang van de maatschappij. Natuurlijk zal deze analyse anders uitpakken wanneer sprake is van een strafrechtelijke veroordeling op basis van ernstige misdrijven.

Transparantie

Naast de genoemde specifieke problemen lijkt de manier waarop de GATS verplichtingen zijn omgezet als geheel in strijd met de GATS transparantieverplichting. Beide vormen van nationale implementatie zijn bijzonder complex. Dit is op zichzelf al in strijd met de gedachte achter de GATS, het faciliteren van toegang tot de dienstenmarkt voor buitenlands dienstverleners en de creatie van een gelijk speelveld. Het is lastig om hierbij te spreken over een directe inbreuk, maar gezien de continue aanscherpingen van het nationale recht ten aanzien van het migratierecht en het recht op toegang tot de arbeidsmarkt lijkt de complexe omzetting een bewuste keuze. De implementatie van de GATS verbintenissen binnen een systeem dat ook van toepassing is op permanente vormen van migratie leidt tot problemen omdat deze implementatie daarmee ook onderdeel wordt van de steeds strenger wordende toelatingsvoorwaarden. Dit is exact het tegenovergestelde van wat de GATS probeert te bereiken, te weten progressieve liberalisering als gevolg van bindende specifiek aangegane verbintenissen. Dit is mogelijk een directe inbreuk op deze verbintenissen, waarbij dan sprake kan zijn van een inbreuk klacht ten aanzien van geschillenbeslechting, maar dit zal niet snel als zodanig vast zijn te stellen. Dit laat onverlet dat de gekozen implementatie als geheel het object vormt van een niet-inbreuk klacht. Deze vorm van klachten zouden dienst kunnen doen ter bescherming van gerechtvaardigd vertrouwen met betrekking tot de aangegane verbintenissen. Er is ook mogelijk sprake van het tenietdoen of ernstig uithollen van een specifiek aangegane verbintenis. Dit alles is hoogst speculatief aangezien er geen jurisprudentie voorhanden is.

Dit neemt niet weg dat een sterk gevoel van geleidelijke uitholling van de Uruguay ronde verbintenissen gaande is, waarbij de dienstverlener uiteindelijk door allerlei administratieve hoepels dient te springen. Het is onthullend om een vergelijking te trekken met de EU. Vergelijkbare condities ingesteld door de lidstaten ten aanzien van uitzenddiensten, detachering en toegang voor Turkse onderdanen worden consequent in strijd met EU recht verklaard door het Hof van Justitie. Dat verschil moge inherent zijn aan de verschillen tussen de WTO en de EU, de op dit moment bestaande verschillen ten aanzien van transparantie en het faciliteren van toegang zijn gigantisch. Een mogelijke oplossing voor de geïdentificeerde problemen is de creatie van een GATS vorm 4 visum waarbij de condities worden gevormd zoals deze op grond van de GATS mogen worden gesteld.

Concluderende analyse

De internationale ambitie ten aanzien van de liberalisering van dienstverlening is niet terug te vinden op het nationale niveau. De verschillen tussen de internationale verplichtingen en de nationale implementatie toont een overduidelijk contrast aan op drie niveaus. Ten eerste ontbreekt de internationale ambitie, zoals deze op WTO niveau wordt uitgesproken, op nationaal niveau. De implementatie laat het tegenovergestelde zien van de doelstelling van de GATS. Het is duidelijk dat de onderzochte lidstaten zeer terughoudend zijn in het voorzien in duidelijke regels ten aanzien van vorm 4 toegang. Ten tweede is de ambitie zoals deze tot uitdrukking komt op EU niveau wel terug te vinden op het nationale niveau, maar alleen ten aanzien van gewenste categorieën dienstverleners. Problemen ontstaan bij de mobiliteit welke leidt tot de toegang van niet-EER onderdanen. Hier komt opnieuw de weerstand tot uitdrukking van de lidstaten. Het accepteren van de noodzaak van dienstenmobiliteit ten aanzien van de liberalisering van de handel in diensten blijkt zeer lastig gezien de beleidsterreinen waarvoor dit gevolgen heeft. Interessant is dat de EU rechtsorde deze weerstand op nationaal niveau in hoge mate weet te overkomen. Daarbij is van wezenlijk belang dat de EU de geschonken rechten verder uitwerkt in secundaire regelgeving. Hierdoor wordt duidelijk wat precies moet worden geïmplementeerd om dienstenmobiliteit te bereiken. Dit is niet het geval ten aanzien van de GATS rechten. Het derde contrast bevestigd de waargenomen spanning tussen de erkenning van de voordelen van de handel in diensten en de gelijktijdige noodzaak tot soevereiniteitsverlies ten aanzien van het migratie- en het toegang tot de arbeidsmarktbeleid. De aangegane en de aangeboden verbintenissen op WTO niveau hebben voornamelijk betrekking op hoog opgeleide dienstverleners en dat onder zeer restrictieve voorwaarden. Het gevolg is dat gebruik van deze vorm van mobiliteit vrijwel afwezig is ten aanzien van de onderzochte lidstaten.

Slot opmerkingen

De hoofdvraag gesteld in dit onderzoek was: Hoe implementeren staten verplichtingen volgende uit de liberalisering van dienstenmobiliteit zoals deze zijn geaccepteerd in een voorbij staatssoevereiniteit context en op welke wijze beïnvloed dit het belang van een staat om controle te behouden over zijn migratie- en toegang tot de arbeidsmarktbeleid. De achtergrond van de aangegane verbintenissen wordt gevormd door de doelstelling van internationale vrede door middel van marktintegratie. Tegenwoordig vormt dienstverlening de basis voor vele economieën, inclusief die van de EU lidstaten. De schattingen ten aanzien van de economische groei welke kan worden bereikt door middel van dienstenliberalisering zijn hoog. Daarbij dient aangetekend te worden dat een multinationale overeenkomst gericht op

wederkerige liberalisering van de handel in diensten er voor moet zorgen dat dienstenmobiliteit onderdeel uitmaakt van de overeenkomst. Deze wederkerigheid is ook erkent tijdens de totstandkoming van de GATS. Echter, de huidige liberalisering is sterk gericht op de belangen van ontwikkelde landen, en de Doha ronde lijkt daar weinig verandering in aan te brengen.

Het vaststellen van de invloed van liberalisering van de handel in diensten op migratie- en toegang tot de arbeidsmarktbeleid vereist een duidelijke afbakening van de economische activiteit dienstverlening van andere economische activiteiten, alsmede een vaststelling van de vormen van dienstverlening welke een impact hebben op deze terreinen. Het onderscheidend criterium ten aanzien van arbeid ligt in de tijdelijke aard van dienstverlening en het ontbreken van een arbeidsovereenkomst. Hoewel deze criteria duidelijk zijn, discussie vindt plaats ten aanzien van het beschikbaar stellen van arbeidskrachten. Detachering, uitzenddiensten en intra-concern overplaatsingen zijn vormen van dienstverlening aangezien de arbeidsovereenkomst niet overgaat en de verplaatsing tijdelijk blijft. Zolang dergelijke situaties geen toegang tot de arbeidsmarkt inhouden dienen zij gescheiden te blijven van arbeidsmigratie. Deze noodzaak hangt direct samen met het concept dienstverlening zelf. Om te kunnen concurreren op basis van een gelijk speelveld is het noodzakelijk dat de dienstverlener zijn personeel kan overplaatsen naar een andere staat om een specifiek dienstencontract uit te voeren.

Dat dienstenmobiliteit leidt tot stevige weerstand binnen de nationale rechtsordes van Nederland en het Verenigd Koninkrijk kan verklaard worden aan de hand van twee, met elkaar samenhangende conclusies. Ten eerste, de belangen van een ministerie dat zich bezig houdt met internationale handel verschilt van de belangen van een ministerie verantwoordelijk voor migratie en toegang tot de arbeidsmarkt beleid. Ten tweede, staten zijn duidelijk huiverig om internationale verplichtingen aan te gaan met betrekking tot de twee genoemde beleidsterreinen. Zelfs bij gebreke aan specifiek bewijs drukken angst voor massa-immigratie, toegang van ongewenste immigranten, sociale dumping en een regeltechnische race naar de bodem een zware wissel op de discussie aangaande de liberalisering van dienstenmobiliteit.

Los van deze angsten heeft de liberalisering van handel in diensten heeft geleid tot bindende internationale verplichtingen die simpelweg moeten worden geïmplementeerd. Verscheidene gebreken ten aanzien van de implementatie zijn blootgelegd in dit onderzoek. Bovendien, de belangrijkste conclusie voor Nederland en het Verenigd Koninkrijk is de noodzaak om te accepteren dat liberalisering van de handel in dienstverlening verbonden is met dienstenmobiliteit. Het is niet mogelijk om de doelstellingen op het WTO en EU niveau te behalen, terwijl de mobiliteit van natuurlijke personen niet wordt geliberaliseerd. De analyse van het EU vrij verkeer van dienstverleners en de GATS verbintenissen leidt tot een belangrijke vraag die moet worden beantwoord door beleidsmakers in Nederland en het VK. Is

de investering gemaakt op het internationale niveau, de manier waarop deze investering in de huidige en aangeboden vorm 4 verbintenissen en de wijze waarop de huidige verbintenissen worden geïmplementeerd daadwerkelijk waar het om gaat bij vorm 4? Is het werkelijk noodzakelijk om te spreken van de liberalisering van dienstverlening in het algemeen en in het kader van de Doha ontwikkelingsronde, terwijl in werkelijkheid enkele zeer restrictieve vormen van mobiliteit worden bereikt voor een paar hoogopgeleide categorieën?

Zoals duidelijk zal zijn uit de getrokken conclusies, dit onderzoek is gebaseerd op een juridisch standpunt. Het is een feit dat bindende internationale verplichten zijn aangegaan, gebaseerd op een soevereiniteitsoverdracht in het geval van de EU, en een wederkerige bundel van verbintenissen binnen het kader van het WTO recht. Lidstaten van beide rechtsordes moeten deze consequenties accepteren, of ze moeten streven naar een herziening van de internationale afspraken binnen het relevante internationale rechtskader. Als gevolg van de gesloten internationale verdragen is de liberalisering van het dienstenverkeer een juridische verplichting, niet een politieke keuze. Mobiliteit van natuurlijke personen had buiten de GATS gelaten kunnen worden, maar WTO lidstaten hebben daar niet voor gekozen. Deze keuze is het resultaat van een wederkerige overeenkomst tussen WTO lidstaten. Dienstenmobiliteit leidt niet tot permanent verblijf of tot toegang tot de arbeidsmarkt. Het leidt niet tot een recht op sociale zekerheid. Als dit in de realiteit wel het geval is, dan is dat een probleem van de implementatie en handhaving van de regels. De oplossing is niet om een complex bureaucratisch systeem te creëren ter implementatie van dienstenmobiliteit, terwijl de aangegane internationale verplichtingen worden genegeerd.

References

Literature

ACVZ 2007
Adviescommissie voor Vreemdelingenzaken *Mvv, Weg Ermee? Voorstel voor één Procedure voor Inreis- en Verblijfsvergunning* (Adviescommissie voor Vreemdelingenzaken, The Hague 2007)

Adlung and Roy 2005
R Adlung and M Roy 'Turning Hills into Mountains? Current Commitments under the General Agreement on Trade in Services and Prospects for Change' (2005) 39 *Journal of World Trade*

Akerlof 1970
G Akerlof 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 85 *Quarterly Journal of Economics*

Alexander and Andenas 2008
K Alexander and M Andenas 'Introduction' in: K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Al-Kashif 2008
AEM Al-Kashif 'GATS's Non-Violation Complaint' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Alkema 2015
EA Alkema *Over implementatie van internationaal recht – de internationale rechtsorde is de onze nog niet* Inaugural address University of Leiden, available online: <https://openaccess.leidenuniv.nl/handle/1887/3764>

Alter 2001
KJ Alter *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford University Press, Oxford 2001)

Altinger and Enders 1996
L Altinger and A Enders 'The Scope and Depth of GATS Commitments' (1996) 19 *The World Economy* 307

Amtenbrink and Vedder 2013
F Amtenbrink and HHB Vedder *Recht van de Europese Unie* (Boom Juridische uitgevers, The Hague 2013)

Arena 2015
A Arena 'Revisiting the Impact of GATS on Public Services' in M Krajweski (ed) *Services of General Interest Beyond the Single Market* (T.M.C. Asser Press, The Hague 2015)

Arkell 2006
J Arkell *GATS and Domestic Regulation Disciplines and Sustainable Development Principles and Operational Concepts: The Challenges* (ICTSD, Geneva 2006), available online: <www.ictsd.org>

Arup 2000
C Arup *The New World Trade Organization Agreements, Globalizing Law through Services and Intellectual Property* (Cambridge University Press, Cambridge 2000)

Aust 2000
A Aust *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge 2000)

Bache and George
I Bache and S George *Politics in the European Union* (Oxford University Press, Oxford 2006)

Baldwin 2014
R Baldwin *Multilateralising 21st Century Regionalism* OECD Global Forum on Trade Paper (2014) available online: <http://www.oecd.org>

Barnard 2009
C Barnard "British Jobs for British Workers". The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38:3 *Industrial Law Journal*

Barlow 2001
M Barlow 'The last frontier: GATS' (2001) 28:87 *Review of African Political Economy*

Barnard 2005
C Barnard 'Case C-209/03, R (on the application of Danny Bidar) v. London Borough of Ealing, Secretary of State for Education and Skills' (2005) 42 *Common Market Law Review*

Barnard 2008
C Barnard 'Unravelling the Services Directive' (2008) 45 *Common Market Law Review*

Barnard 2010
C Barnard *The Substantive Law of the EU, the Four Freedoms* (Oxford University Press, Oxford 2010)

Barnard 2012
C Barnard *EU Employment Law* (Oxford University Press, Oxford 2012)
Bast 2008a
J Bast 'Article V*bis* GATS' in: R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)
Bast 2008b
J Bast 'Annex on Movement of Natural Persons Supplying Services Under the Agreement' in: R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)
Beine, Docquier and Rapoport 2001
M Beine, F Docquier and H Rapoport 'Brain Drain and Economic Growth: Theory and Evidence' (2001) 64 *Journal of Development Economics*
Bellmann 2014
C Bellmann 'The Bali Agreement: Implications for Development and the WTO' (2014) The Graduate Institute, International Development Policy Articles and Debates 5.2
Bhagwati 1984
JN Bhagwati 'Splintering and Disembodiment of Services and Developing Nations' (1984) 7 *The World Economy*
Bhagwati 1987
JN Bhagwati 'Trade in Services and the Multilateral Trade Negotiations' (1987) 1:4 *The World Bank Economic Review*
Blaakman, Driece and de Lange 2001
R Blaakman, R Driece and T de Lange *Vreemdelingen in Nederland aan het Werk* 2001 (Kluwer, Deventer 2001)
Boeles, den Heijer, Lodder and Wouters 2009
P Boeles, M den Heijer, G Lodder and K Wouters *European Migration Law* (Intersentia, Antwerpen 2009)
Bogdani, von and Windsor 2008
A von Bogdany and J Windsor 'Understanding on Commitments in Financial Services' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)
Borjas 2003
GJ Borjas 'The Labor Demand Curve *is* Downwards Sloping: Re-examining the Impact of Migration on the Labour Market' (2003) 118:4 *Quarterly Journal of Economics*

Borjas, Freeman and Katz 1997
GJ Borjas, RB Freeman and L Katz 'How Much do Immigration and Trade affect Labor Market Outcomes' (1997) 1 *Brookings Papers on Economic Activity*

Bossche, van den and Denters 2007
P Van den Bossche and E Denters 'Internationaal Economisch Recht' in N Horbach, R Lefeber and O Ribbelink (eds) *Handboek Internationaal Recht* (T.M.C. Asser Press, The Hague 2007)

Bossche, van den and Zdouc 2013
P Van den Bossche and W Zdouc *The Law and Policy of the World Trade Organization* (Cambridge University Press, Cambridge 2013)

Bräuniger 2015
D Bräuniger 'Debate on Free Movement. Does the EU Need New Rules on Social Security Co-ordination?' (2015) Deutsche Bank Research Briefing European Integration

Bronckers 2008
M Bronckers 'From "Direct Effect" to "Muted Dialogue", Recent Developments in the European Courts' Case Law on the WTO and Beyond' (2008) 11:4 *Journal of International Economic Law*

Bronckers and Larouche 2008
M Bronckers and P Larouche 'A Review of the WTO Regime for Telecommunications Services' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Brouwer 2006
E Brouwer *Digital Borders and Real Rights, Effective Remedies for Third-Country Nationals in the Schengen Information System* (Wolf Legal Publishers, Nijmegen 2006)

Burgess 2007
M Burgess 'Federalism and Federation' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007)

Cass 2005
DZ Cass *The Constitutionalization of the World Trade Organization. Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford 2005)

Cecchini, Catinat and Jacquemin 1988
P Cecchini, M Catinat and A Jacquemin *The European Challenge 1992 – The Benefits of a Single Market* (Wildwood House, Aldershot 1988)

Chalmers, Davies and Monti 2014
D Chalmers, G Davies and G Monti *European Union Law* (Cambridge University Press, Cambridge 2014)

Charnovitz 1987
S Charnovitz 'The influence of international standards on the world trading regime. A historical overview' (1987) 126:5 *International Labour Review*
Chaudhuri, Mattoo and Self 2004
S Chaudhuri, A Mattoo and R Self 'Moving People to Deliver Services: How can the WTO Help?' (2004) 38 *Journal of World Trade*
Chetail 2008
V Chetail 'Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue' (2008) 51 *German Yearbook of International Law* 183
Cho 1998
S Cho 'GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?' *Harvard International Law Journal* (1998) 39
Cho 2009
S Cho 'Development by Moving People: Unearthing the Development Potential of a GATS Visa' in C Thomas and JP Trachtman (eds) *Developing Countries in the WTO Legal System* (Oxford University Press, Oxford 2009)
Cholewinski 2004
R Cholewinski *The Legal Status of Migrants Admitted for Employment* (Council of Europe Publishing, Strasbourg 2004)
Cholewinski 2012
R Cholewinski 'International Labour Migration' in B Opeskin, R Perruchoud and J Redpath-Cross (eds) *Foundations of International Migration Law* (Cambridge University Press, Cambridge 2012)
Clayton 2014
G Clayton *Textbook on Immigration and Asylum Law* (Oxford University Press, Oxford 2014)
Collier and Dollar 2001
P Collier and D Dollar *Globalization, Growth and Poverty: Building an Inclusive World Economy* (Oxford University Press, Oxford 2001)
Condinanzi, Lang and Nascimbene 2008
M Condinanzi, A Lang and B Nascimbene *Citizenship of the Union and Freedom of Movement of Persons* (Martinus Nijhoff Publishers, Leiden 2008)
Cottier and Delimatsis 2008
T Cottier and P Delimatsis 'Article XIV *bis* GATS Security Exceptions' in: R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Cottier and Molinuevo 2008
T Cottier and MA Molinuevo 'Article V GATS' in: R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Cottier and Oesch 2012
T Cottier and M Oesch 'Direct and Indirect Discrimination in WTO and EU law' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press, Cambridge 2012)

Cottier, Delimatsis and Diebold 2008
T Cottier, P Delimatsis and NF Diebold 'Article XIV GATS General Exceptions' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Craig and De Búrca 2015
P Craig and G de Búrca *EU Law. Text, Cases and Materials* (Oxford University Press, Oxford 2015)

Craven 2014
M Craven 'Statehood, self-determination, and recognition' in MD Evans *International Law* (Oxford University Press, Oxford 2014)

Crawford and Fiorentino 2005
J Crawford and RV Fiorentino 'The Changing Landscape of Regional Trade Agreements' (2005) No 8 *WTO Discussion Paper*, available online: <http://www.wto. org/english/rese/booksp_e/discussion_papers8_e.pdf>

Cremona 2011
M Cremona 'External Relations and External Competence of the European Union' in P Craig and G de Búrca (eds) *The Evolution of EU Law* (Oxford University Press, Oxford 2011)

Dawson 2013
LR Dawson 'Labour Mobility and the WTO: The Limits of GATS Mode 4' (2013) 51:1 *International Migration*

Delimatsis 2006a
P Delimatsis 'Don't Gamble with GATS – The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the *US – Gambling Case*' (2006) 40 *Journal of World Trade*

Delimatsis 2006b
P Delimatsis 'Due Process and "Good" Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS' (2006) 10 *Journal of International Economic Law*

Delimatsis 2007
P Delimatsis *Necessity, Transparency, and Regulatory Diversity in Trade in Services* (Oxford University Press, Oxford 2007)
Delimatsis 2008
P Delimatsis 'Article III GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)
Delimatsis 2014
P Delimatsis 'The Principle of Necessity in the WTO, Lessons for the GATS Negotiations on Domestic Regulation' (2014) 04 *Tilburg Law School Legal Studies Research Paper Series*, available online: <www.tilburguniversity.edu/research/institutes-and-research-groups/tilec/research/publications/discussion-papers/2013/>
Diebold 2008
NF Diebold 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2008) 11 *Journal of International Economic Law*
Djordjevic 2002
M Djordjevic 'Domestic Regulation and Free Trade in Services – A Balancing Act' (2002) 29 *Legal Issues of Economic Integration*
Dommen 2005
C Dommen 'Migrants' Human Rights: Could GATS Help?' (2005) *Migration Information Source*, available online: <http://www.migrationinformation.org>
Drake and Nicolaïdis 1992
WJ Drake and K Nicolaïdis 'Ideas, Interests and Institutionalization: "Trade in Services" and the Uruguay Round' (1992) 46 *International Organization*
Drongelen, van, Bogaard, van den and Rijs, van 2005
J van Drongelen, PJS van den Bogaard and ADM van Rijs *Commentaar Wet Arbeid Vreemdelingen* (Sdu Uitgevers, The Hague 2005)
Dustmann and Preston 2000
C Dustmann and I Preston *Racial and Economic Factors in Attitudes to Immigration* (2000) 190 IZA Institute for the Study of Labor Discussion Paper, available online: <http://ftp.iza.org>
Edström 2006
Ö Edström 'The Free Movement of Services in Conflict with the Swedish Industrial Relations Model – or was it the Other Way Around?' in N Wahl and P Cramér (eds) *Swedish Studies in European Law volume 1* (Hart Publishing, Oregon 2006)
Elvira Méndez-Pinedo 2009
M Elvira Méndez-Pinedo *EC and EEA Law. A Comparative Study of the Effectiveness of European Law* (Europa Law Publishing, Groningen 2009)

Entzinger 2007
H Entzinger 'De Echte Dilemma's van een Modern Migratiebeleid' (2007) 9 *Migrantenrecht*
Evans 1982
AC Evans 'European Citizenship' (1982) 45 *Modern Law Review*
Evans 2009
S Evans 2009 'The Services Directive: (Too) Great Expectations?' in J van de Gronden (ed) *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?* (Wolters Kluwer, Alphen aan den Rijn 2009)
Faist 2007
T Faist *Transstate Social Spaces and Development: Exploring the Changing Balance between Communities, States and Markets* (2007) 169 International Institute for Labour Studies Discussion Paper, available online: <www.ilo.org>
Feketekuty 2000
G Feketekuty 'Regulatory Reform and Trade Liberalization in Services' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000)
Fernandes 2008
D Fernandes 'Twins, Siblings or Friends: The Conceptual Case of Goods and Services, Where Do We Stand and Where Could We be Headed to?' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)
Florkowski 2006
GW Florkowski *Managing Global Legal Systems: International Employment Regulation and Competitive Advantage* (Routledge, New York 2006)
Footer 2002
ME Footer 'The General Agreement on Trade in Services: Taking Stock and Moving Forward' (2002) 29 *Legal Issues of Economic Integration*
Foster 2013
N Foster *Foster on EU Law* (Oxford University Press, Oxford 2013)
Franssen 2012
EJA Franssen 'Het werkgeversbegrip in de Wet arbeid vreemdelingen: breder kunnen we het niet maken' (2012) 17 *ArbeidsRecht*
Franssen 2014
EJA Franssen *Wet Arbeid Vreemdelingen* (Kluwer, Deventer 2013)
Friedberg and Hunt 1995
RM Friedberg and J Hunt 'The Impact of Immigration on Host Country Wages, Employment and Growth' (1995) 9:2 *Journal of Economic Perspectives*

Fuchs 2008
C Fuchs 'GATS Negotiating History' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)
Gaines and Olsen 2012
SE Gaines and BE Olsen 'Trade and social objectives' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press, Cambridge 2012)
Gaines, Egelund and Sørensen 2012
SE Gaines, B Egelund Olsen and KE Sørensen 'Comparing Two Trade Liberalisation Regimes' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press, Cambridge 2012)
Gao 2008
H Gao 'Telecommunications Services: Reference Paper' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)
Gaston and Nelson 2000
N Gaston and D Nelson 'Immigration and Labour-Market Outcomes in the United States: A Political-Economy Puzzle' (2000) 16:3 *Oxford Review of Economic Policy*
Gauthier, O'Brien and Spencer 2000
G Gauthier, E O'Brien and S Spencer 'Déjà Vu, or New Beginning for Safeguards and Subsidies Rules in Services Trade?' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000)
Geddes 2005
A Geddes 2005, Immigration and the welfare state, in: E Guild and J Selm (eds) *International Migration and Security, Opportunities and Challenges* (Routledge London, 2005)
Glenn 2003
JK Glenn 'EU enlargement' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2003)
Global Commission on International migration 2005
Global Commission on International Migration *Migration in an Interconnected World: New Directions for Action* (SRO-Kundig, Geneva 2005)
Godsoe 2014
H Godsoe 'The Depth of the Trade in Services Agreement' *Brigham YoungUniversity International Law and Management Review* (2014) 10:1

Goldfarb, Havrylyshyn and Mangum 1984
R Goldfarb, O Havrylyshyn and S Mangum 'Can Remittances Compensate for Manpower Outflows, the Case of Philippine Physicians' (1984) 15:1 *Journal of Development Economics*

Gormley 1994
L Gormley 'The European Economic Area and the Europe Agreements' in J Stuyck and A Looijestijn-Clearie (eds) *The European Economic Area EC-EFTA* (Kluwer, Deventer 1994)

Gray 2005
A Gray 'Unsocial Europe; The Future of the European Model in the Face of Globalisation' (2005) *London South Bank University Paper*, online available: <http://www.sv.uio.no/arena/english/research/projects/cidel/old/WorkshopStockholm/Gray.pdf >

Groen *et al* 2013a
S Groen, T de Lange, K Grootfaam, N Kruidenberg and G Leeuwis 'Wet Modern Migratiebeleid: Overheid en Referent' (2013) 4 *Asiel & Migrantenrecht*

Groen *et al* 2013b
S Groen, T de Lange, K Grootfaam, N Kruidenberg and G Leeuwis 'Wet Modern Migratiebeleid: De Gevolgen voor de Vreemdeling' (2013) 4 *Asiel & Migrantenrecht*

Groenendijk 2005
K Groenendijk 'Access of Third-Country Nationals to Employment under the New EC Migration Law' in F Julien-Laferrière, H Labayle and O Edström (eds) *The European Immigration and Asylum Policy: Critical Assessment Five Years after the Amsterdam Treaty* (Bruylant, Brussels 2005)

Groenendijk 2006
K Groenendijk 'Citizens and Third Country Nationals: Differential Treatment or Discrimination?' in JY Carlier and E Guild (eds) *The Future of Free Movement of Persons in the EU* (Bruylant, Brussels 2006)

Groenendijk 2009
K Groenendijk 'Forty Years of Free Movement of Workers: Has It Been a Success and Why' in P Minderhoud and N Trimikliniotis (eds) *Rethinking the free movement of workers: the European challenges ahead* (Wolf Legal Publishers, Nijmegen 2009)

Groenendijk and Luiten 2010
K Groenendijk and M Luiten *Rechten van Turkse burgers op grond van de Associatie EEG-Turkije* (Wolf Legal Publishers, Nijmegen 2010)

Groenendijk and Oosterom-Staples 2014
K Groenendijk and H Oosterom-Staples 'Nieuwe Vreemdelingencirculaire: Associatierecht voor Turkse Burgers Gebrekkig Weergegeven' (2014) 1 *Asiel en Migrantenrecht*

Gronden van de 2012
J van de Gronden 'The Freedom to Provide Services' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press, Cambridge 2012)

Gronden van de 2013
J van de Gronden 'Transnational Competition Law and Public Services' in C Herrmann, M Krajewski and JP Terhechte (eds) *2013 European Yearbook of International Economic Law* (Springer-Verlag, Berlin 2013)

Grote 2008a
R Grote 'Article XXII GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Grote 2008b
Grote 'Article XXIII GATS' in R Wolfrum, PT Stoll and C Feinäugle (eds), *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Grütters *et al* 2012
C Grütters, R Fernhout, K Groenendijk, A Hekman, M Kullmann, P Minderhoud, R van Oers, T Strik and K Zwaan *Migratierecht* (Boom Juridische uitgevers, The Hague 2012)

Guibboni 2006
S Guibboni *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective* (Cambridge University Press, Cambridge 2006)

Guild 2001
E Guild 'Primary Immigration: The Great Myths' in E Guild and C Harlow (eds) *Implementing Amsterdam, Immigration and Asylum Rights in EC Law* (Hart Publishing, Oxford 2001)

Guild 2005
E Guild 'The Legal Framework, Who is Entitled to Move?' in D Bigo and E Guild (eds) *Controlling Frontiers, Free Movement into and Within Europe* (Ashgate, Farnham 2005)

Guild 2008
E Guild 'Mode 4 and the EU: EU Free Movement of Services and Member State Powers on Immigration' (2008) *Quaker United Nations Office Programme on Labour Mobility Briefing Paper*

Guild 2011
E Guild 'Equivocal Claims? Ambivalent Controls? Labour Migration Regimes in the European Union' in E Guild and S Mantu (eds) *Constructing and Imagining Labour Migration. Perspectives of Control from Five Continents* (Ashgate, Farnham 2011)
Guild and Barth 1999
E Guild and P Barth 'The Movement of Natural Persons and the GATS: A UK Perspective and European Dilemmas' (1996) 4 *European Foreign Affairs Review*
Hainmueller and Hiscox 2007
J Hainmueller and MJ Hiscox, 'Educated Preferences: Explaining Attitudes Toward Immigration in Europe' (2007) 61 *International Organization*
Hamilton and Whalley 1984
C Hamilton and J Whalley 'Efficiency and Distributional Implications of Global Restrictions on Labour Mobility: Calculations and Policy Implications' (1984) 14(1-2) *Journal of Development Economics*
Harvey and Behling 2008
M Harvey and F Behling 'Self-employment and bogus self-employment in the construction industry in the United Kingdom' (2008) Expert Country Report, available online: <http://www.efbww.org>
Hatzopoulos 2012a
V Hatzopoulos *Regulating Services in the European Union* (Oxford University Press, Oxford 2012)
Hatzopoulos 2012b
V Hatzopoulos 'Forms of Mutual Recognition' in: I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press, Cambridge 2012)
Hatzopoulos and Uyen Do 2006
V Hatzopoulos and T Uyen Do 'The Case Law of the ECJ Concerning the Free Movement Provision of Services: 2000-2005' (2006) 43 *Common Market Law Review*
Hayter 2000
T Hayter *Open Borders: The Case Against Immigration Control* (Pluto Press, London 2000)
Heer, de *et al* 2008
JC de Heer, KM Zwaan, R Fernhout, CA Groenendijk, B de Hart, T de Lange and PE Minderhoud *Migratierecht* (Boom Juridische uitgevers, The Hague 2008)
Hepple 2002
B Hepple, *Social and Labour Rights in a Global Context: International and Comparative Law Perspectives* (Cambridge University Press, Cambridge 2002)

Hessel, Perton and Schiebroek 2009
B Hessel, E Perton and M Schiebroek *De Dienstenrichtlijn Decentraal, de Gevolgen van de Dienstenrichtlijn voor Decentrale Overheden* (Sdu Uitgevers, The Hague 2009)
Hill 1999
P Hill 'Tangibles, Intangibles and Services: a New Taxonomy for the Classification of Output' (1999) 32:2 *Canadian Journal of Economics*
Hoekman and Kostecki 2001
B Hoekman and M Kostecki *The Political Economy of the World Trading System* (Oxford University Press, Oxford 2001)
Hoekman and Mattoo 2012
B Hoekman and A Mattoo *Liberalizing Trade in Services: Lessons from Regional and WTO Negotiations* (2012) Research Paper Global Trade and Financial Architecture Project, available online: <http://globalgovernanceprogramme.eui.eu>
Hoogerhuys, van 't 2009
FH van 't Hoogerhuys 'Naar een Modern Arbeidsmigratiebeleid' (2009) 4:23 *Journaal Vreemdelingenrecht*
Houwerzijl 2005
MS Houwerzijl *De Detacheringsrichtlijn, Over de Achtergrond, Inhoud en Implementatie van Richtlijn 96/71/EG* (Kluwer, Deventer 2005)
Howse 2012
R Howse 'Interpreting the GATS Arrangements on Telecoms' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press, Cambridge 2012)
ICTSD 2008a
International Centre for Trade and Sustainable Development 'Services Signalling Conference set for Ministerial Week' (2008) 12:25 *Bridges*
ICTSD 2008b
International Centre for Trade and Sustainable Development 'WTO Mini-Ministerial Ends in Collapse' (2008) 10 *Bridges Daily Update*, 30 July 2008, available online: <www.ictsd.org>
ICTSD 2010
International Centre for Trade and Sustainable Development 'Cross-border trade in services: Barriers and opportunities in EU services markets for ACP exporter' (2010) 9:9 *Trade Negotiations Insights* available online: <http://ictsd.org/i/competitiveness/94184/>

Idriz and Slot 2010
NF Idriz and PJ Slot 'Free Movement of Persons between Turkey and the EU: the Hidden Potential of Article 41(1) of the Additional Protocol' (2010) 2 *Centre for the Law of EU External Relations Working Papers*

ILO 2004
International Labour Organization World Commission on the Social Dimension of Globalization *A Fair Globalization: Creating Opportunities for All* (ILO, Geneva 2004)

Irwin and Weiler 2008
DA Irwin and J Weiler 'Case Comment. Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)' (2008) 7:1 *World Trade Review*

Jackson 1990
JH Jackson *Restructuring the GATT system* (Council on Foreign Relations Press, New York 1990)

Jackson 1992
JH Jackson Status of Treaties in Domestic Legal Systems (1992) 86 *American Journal of International Law* p 310-340

Jackson 1997
JH Jackson 'The WTO Dispute Settlement Understanding, Misunderstandings on the Nature of Legal Obligation' (1997) 91 *American Journal of International Law*

Jackson 1998
JH Jackson *The World Trade Organization. Constitution and Jurisprudence* (Royal Institute of International Affairs, London 1998)

Jackson 2006
JH Jackson *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge University Press, Cambridge 2006)

Jans, Prechal and Widdershoven 2011
JH Jans, S Prechal and RJGM Widdershoven *Inleiding tot het Europees Bestuursrecht* (Ars Aequi Libri, Nijmegen 2011)

Jansen 2010
OJDM Jansen 'De Referent als Boeteling. Bestuursrechtelijke Sanctionering in de Wet Modern Migratiebeleid' (2010) 1:5 *Journaal Vreemdelingenrecht*

Jara and del Carmen Domínguez 2006
A Jara and M del Carmen Domínguez 'Liberalization of Trade in Services and Trade Negotiations' (2006) 40 *Journal of World Trade*

Jones and Sufrin
A Jones and B Sufrin *EU Competition Law Text, Cases & Materials* (Oxford University Press, Oxford 2010)

Jorens and Buynder 2008
Y Jorens and T van Buynder 'Self-Employment and Bogus Self-Employment in the European Construction Industry in the Netherlands' (2008) Expert Country Report, available online: <http://www.efbww.org>
Junge 2007
K Junge 'Differentiated European Integration' in M Cini *European Union Politics* (Oxford University Press, Oxford 2007)
Karsenty 2000
G Karsenty 'Assessing Trade in Services by Mode of Supply' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000)
Kennedy 2001
M Kennedy 'Two Single Undertakings – can the WTO Implement the Results of a Round?' (2001) 14:1 *Journal of International Economic Law*
Kennett 1996
W Kennett 'The European Community and the General Agreement on Trade in Services' in N Emiliou and D O'Keeffe (eds) *The European Union and World Trade Law after the GATT Uruguay Round* (John Wiley & Sons, Chichester 1996)
Klamert 2015
M Klamert *Services Liberalization in the EU and the WTO. Concepts, Standards and Regulatory Approaches* (Cambridge University Press, Cambridge 2015)
Klap and de Lange 2008
AP Klap and T de Lange 'Marktordening via het werkgeversbegrip van de Wet arbeid vreemdelingen' (2008) 10 *SMA Tijdschrift over Arbeid en Sociale Zekerheid*
Koopmans and Goudriaan 2008
E Koopmans and M Goudriaan 'Naar een Modern en Europees Migratiebeleid' (2008) 2:31 *Journaal Vreemdelingenrecht*
Krajewski 2003
M Krajewski *National Regulation and Trade Liberalization in Services. The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (Kluwer Law International, The Hague 2003)
Krajewski 2005
M Krajewski 'Playing by the Rules of the Game? Specific Commitments after *US – Gambling and Betting* and the Current GATS Negotiations' (2005) 32 *Legal Issues of Economic Integration*

Krajewski 2008
M Krajewski 'Commentary on Article VI GATS Domestic Regulation' in R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Krajewski, Neergaard and van de Gronden 2009
M Krajewski, U Neergaard and J van de Gronden (eds) *The Changing Legal Framework for Services of General Interest in Europe* (T.M.C. Asser Press, The Hague 2009)

Kroes 2010
J Kroes 'A Modern Migration Policy for the Netherlands' (2010) 15:2 *IBA Immigration and Nationality Law News*

Kruger 2011
P Kruger 'Managing the process of services liberalization' (2011) No S11TB09/2011 *Trade Law Centre for Southern Africa Trade Brief*, available online: <www.tralac.org>

Kuijer *et al* 2005
A Kuijer, E Elderman, M Korevaar, T de Lange, H Masmeyer, M Rootring, M Viering and A Woltjer *Nederlands Vreemdelingenrecht* (Boom Juridische uitgevers, The Hague 2005)

Kuijper 1995
PJ Kuijper 'The New WTO Dispute Settlement System: The Impact on the European Community' (1995) 29 *Journal of World Trade*

Kuijper and Bronckers 2005
PJ Kuijper and M Bronckers 'WTO Law in the European Court of Justice' (2005) 42 *Common Market Law Review*

Lang 2009
ATF Lang 'GATS' in D Bethlehem, D MacRae, R Neufeld and I van Damme (eds) *International Trade Law* (Oxford University Press, Oxford 2009)

Lange de 2005
T de Lange *Staat, Markt en Migrant. De Regulering van Arbeidsmigratie naar Nederland* (Boom Juridische uitgevers, The Hague 2005)

Lange, de 2007
T de Lange Staat, *Markt en Migrant. De Regulering van Arbeidsmigratie naar Nederland* (Boom Juridische uitgevers, The Hague 2007)

Langhammer 2007
R Langhammer 'Services Trade Liberalization as a Handmaiden of Competitiveness in Manufacturing: an Industrialized or Developing Country Issue?' (2007) 41 *Journal of World Trade*

Langille 1997
BA Langille 'Eight ways to think about international labour standards' (1997) 31 *Journal of World Trade*

Langille 2005
BA Langille *What is International Labour Law for?* (International Institute for Labour Studies Geneva 2005), available online: <http://www.crimt.ulaval.ca/Publications/ IILS_Report_2005.pdf>

Leal-Arcas 2008
R Leal-Arcas 'The GATS in the Doha Round' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Lennard 2002
M Lennard 'Navigating by the Stars: Interpreting the WTO Agreements' (2002) 5 *Journal of International Economic Law*

Leroux 2002
EH Leroux 'Trade in Financial Services under the World Trade Organization' (2002) 36 *Journal of World Trade*

Levitt 1983
T Levitt 'The Globalization of Markets' *Harvard Business Review* [1983] May June 92

Lianos and Odudu 2012
I Lianos and O Odudu 'Introduction' in: I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press, Cambridge 2012)

Lodder 2011
GG Lodder *Vreemdelingenrecht in Vogelvlucht. Over Toelating en Verblijf van Vreemdelingen in Nederland* (Sdu Uitgevers, The Hague 2011)

Low and Mattoo 2000
P Low and A Mattoo 'Is There a Better Way? Alternative Approaches to Liberalization under GATS' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000)

Lowenfeld 2008
AF Lowenfeld *International Economic Law* (Oxford University Press, Oxford 2008)

Luard 1982
E Luard *A History of the United Nations. Volume I: The Years of Western Domination 1945-1955* (Macmillan, Basingstoke 1982)

Mah 1998
JS Mah 'ASEAN, Labour Standards and International Trade' (1998) 14 *ASEAN Economic Bulletin*

Marchetti and Mavroidis 2012
JA Marchetti and PC Mavroidis 'Mutual Recognition Agreements in the GATS' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press, Cambridge 2012)
Martin 2000
D Martin 'Comments on Florus Ariël Wijsenbeek and Arblade' (2000) 2 *European Journal of Migration and Law*
Martin 2006
PL Martin, 'GATS Migration and Labor Standards', International Institute for Labour Studies (2006) 165 *ILO Discussion Paper*, available online: <www.ilo.org>
Marwell 2006
JC Marwell 'Trade and Morality: The WTO Public Morals Exception after Gambling' (2006) 81 *New York University Law Review*
Matsushita, Schoenbaum and Mavroidis 2006
M Matsushita, TJ Schoenbaum and PC Mavroidis *The World Trade Organization. Law, Practice, and Policy* (Oxford University Press, Oxford 2006)
Mattoo 1997
A Mattoo 'National Treatment in the GATS, Corner Stone or Pandora's Box?' (1997) 31 *Journal of World Trade* 107
Mattoo 2001
A Mattoo 'Shaping Future GATS Rules for Trade in Services' *World Bank Policy Research Working Paper* 2596
Mattoo and Carzaniga 2003
A Mattoo and A Carzaniga 'The GATS, Mode 4 and Pattern of Commitments' in: Mattoo and Carzaniga (eds) *Moving People to Deliver Services* (World Bank, Washington DC 2003)
Mattoo and Schuknecht 2000
A Mattoo and L Schuknecht 'Trade Policies for Electronic Commerce' *World Bank Policy Research Working Paper* 2380
Mavroidis 2007
PC Mavroidis 'Highway XVI Re-Visited: The Road from Non-Discrimination to Market Access in GATS' (2007) 6 *World Trade Review*
Mayda 2006
AM Mayda 'Who is Against Immigration? A Cross-Country Investigation of Individual Attitudes Towards Immigrants' (2006) 88:3 *The Review of Economics and Statistics*

McGovern 1982
E McGovern *International Trade Regulation: GATT, the United States, and the European Community* (Globefield Press, Exeter 1982)
Mei, van der 2005
AP van der Mei 'Union Citizenship and the De-Nationalisation of the Territorial Welfare State' (2005) 7 *European Journal of Migration and Law*
Mengozzi 2002
P Mengozzi *Private International Law and the WTO Law* (Recueil des Cours vol 929) (Martinus Nijhoff Publishers, The Hague 2001)
Meulman and de Waele 2004
J Meulman and H de Waele 'Funding the life of Brian: Job Seekers, Welfare Shopping and the Frontier of European Citizenship' (2004) 31 *Legal Issues of Economic Integration*
Moravcsik 1991
A Moravcsik 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community' (1991) 45:1 *International Organization*
Mountford 1997
A Mountford 'Can a Brain Drain be Good for Growth in the Source Economy?' (1997) 53 *Journal of Development Economies*
Neergaard 2009
U Neergaard 'Services of General Economic Interest: the Nature of the Beast' in M Krajewski U Neergaard and J van de Gronden (eds) *The Changing Legal Framework for Services of General Interest in Europe* (T.M.C. Asser Press, The Hague 2009)
Neuwahl 1996
NAEM Neuwahl 'Individuals and the GATT: Direct Effect and Indirect Effects of the General Agreement on Tariffs and Trade in Community Law' in N Emiliou and D O'Keeffee (eds) *The European Union and World Trade Law after the GATT Uruguay Round* (John Wiley and Sons, Chichester 1996)
Nicolaïdis and Trachtman 2000
K Nicolaïdis and JP Trachtman 'From Policed Regulation to Managed Recognition in GATS' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000)
Nielson and Cattaneo 2003
J Nielson and O Cattaneo, 'Current Regimes for the Temporary Movement of Service Providers: Case Studies of Australia and the United States' in A Mattoo and A Carzaniga (eds) *Moving People to Deliver Services* (World Bank, Washington DC 2003)

Nielson and Tagliori 2003
J Nielson and D Tagliori *A Quick Guide to the GATS and Mode 4* Background Paper OECD, WORLD BANK and IOM Seminar on Trade and Migration, 12-14 November 2003, available online: <www.iom.int>

Norberg 1994
S Norberg 'The Institutional set up of the EEA Agreement' in J Stuyck and A Looijestijn-Clearie (eds) *The European Economic Area EC-EFTA* (Kluwer, Deventer 1994)

Nordstrom and Shaffer 2007
H Nordstrom and G Shaffer *Access to Justice in the World Trade Organization: The Case for a Small Claims Procedure: A Preliminary Analysis*, Issue Paper 2 (ICTSD, Geneva 2007)

Novitz 2010
T Novitz 'UK Implementation of the Posted Workers Directive 96/71' (2010) 22 Formula Working Paper, available online: <http://www.jus.uio.no/ifp/english/research/projects/freemov/publications/papers>

Odell and Eichengreen 1998
J Odell and B Eichengreen 'The United States, the ITO and the WTO: Exit Options, Agent Slack and Presidential Leadership' in AO Krueger (ed) *The WTO as an International Organization* (University of Chicago Press, Chicago 1998)

Odudu 2009
O Odudu 'Economic Activity as a Limit to Community Law' in C Barnard and O Odudu *The Outer Limits of European Union Law* (Hart Publishing, Oxford 2009)

OECD 1999
OECD Trade Directorate Trade Committee, Working Party of the Trade Committee *Strengthening Regulatory Transparency: Insights for the GATS from the Regulatory Reform Country Reviews* (1999) 43 Working Paper TD/TC/final

OECD 2005
Organization for Economic Co-operation and Development *International Investment Perspectives 2005* (OECD, Paris 2005)

Ortino 2006
F Ortino 'Treaty Interpretation and the WTO Appellate Body Report in *US – Gambling*: a Critique' (2006) 9 *Journal of International Economic Law*

Ortino 2008
F Ortino 'The Principle of Non-Discrimination and its Exceptions in GATS: Selected Legal Issues' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Oyowe 1996
A Oyowe, 'Brain Drain Colossal Loss of Investment for African Countries' (1996) 159 *The Courier ACP-EU Development Magazine*
Pauwelyn 2001
J Pauwelyn 'The Role of Public International Law in the WTO: How Far can we Go?' (2001) 95 *American Journal of International Law*
Pauwelyn 2005
J Pauwelyn 'Rien ne va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS' (2005) 4 *World Trade Review*
Peers 1996
S Peers 'Living in Sin: Legal Integration Under the EC-Turkey Customs Union' (1996) 7:3 *European Journal of International Law*
Peng 2013
S Yi Peng 'Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next version of GATS?' *Hong Kong Law Journal* (2013) 43:2
Persin 2008
D Persin 'Free Movement of Labour: UK Responses to the Eastern Enlargement and GATS Mode 4' (2008) 42 *Journal of World Trade*
Petersmann 1994
E Petersmann 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948' (1994) 31 *CMLR*
Petersmann 1997
E Petersmann *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement* (Kluwer Law International, London 1997)
Pool 2011
C Pool *Migratie van Polen naar Nederland in een Tijd van Versoepeling van Migratieregels* (Boom Juridische uitgevers, The Hague 2011)
Ratha 2012
D Ratha *Remittances: Funds for the Folks Back Home*, (2012) Finance and Development Web Article, available online: <www.imf.org>
Regan 2007
DH Regan 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: the Myth of Cost-Benefit Balancing' (2007) 6 *World Trade Review*
Reurs 2014
MAG Reurs *Tekst en Toelichting Modern Migratiebeleid* (Sdu Uitgevers, The Hague 2014)
Rolland 2010
SE Rolland 'Redesigning the Negotiation Process at the WTO' (2010) 13:1 *Journal of International Economic Law*

Roos 2013
C Roos *The EU and Immigration Policies. Cracks in the Walls of Fortress Europe?* (Palgrave Macmillan, London 2013)
Roy 2009
M Roy Endowments, Power, and Democracy: Political Economy of Multilateral Commitments on Trade in Services WTO Staff Working Paper, September 2009 available online: http://www.wto.org/english/res_e/reser_e/ersd200907_e.pdf>
Ruddy 2010
B Ruddy 'The Critical Success of the WTO Trade Policies of the Current Economic Crisis' (2010) 13:2 *Journal of International Economic Law*
Ryan 2005
B Ryan *Labour Migration and Employment Rights* (The Institute of Employment Rights London, London 2005)
Ryan 2008
B Ryan 'The Accession (Immigration and Worker Authorisation) Regulations 2006' (2008) 37:1 *Industrial Law Journal*
Sampson and Snape 1985
GP Sampson and RH Snape Identifying the Issues in Trade in Services (1985) 8:2 *The World Economy*
Sanchez Montoto 2008
Sanchez Montoto 'Grensoverschrijdende Dienstverlening ingevolge Artikel 49 van het EG-Verdrag en de Tewerkstellingsvergunningsplicht ingevolge de Wet Arbeid Vreemdelingen' (2008) 6 *Migrantenrecht*
Sands and Klein 2001
P Sands and P Klein *Bowett's Law of International Institutions* (Sweet and Maxwell, London 2001)
Sapir 1999
A Sapir 'The General Agreement on Trade in Services: From 1994 to the Year 2000', (1999) 33 *Journal of World Trade*
Sapir and Winter 1994
A Sapir and C Winter, 'Services Trade' in D Greenaway and LA Winters (eds) *Surveys in International Trade* (Blackwell, Oxford 1994)
Sasser, Olsen and Wyckoff 1978
WE Sasser, RP Olsen and DD Wyckoff *Management of Service Operations, Text Cases and Readings* (Allyn and Bacon, Boston 1978)
Scharpf 1997
FW Scharpf 'Introduction: the Problem Solving Capacity of Multi-level Governance' (1997) 4 *Journal of European Public Policy*

Schöllman 2015
W Schöllman *Economic Significance of Trade in Services Background to Negotiations on a Trade in Services Agreement* (2015) European Parliamentary Research Services, available online: < www.europarl.europa.eu>
Schroder 2007
HZ Schroder *Harmonization, Equivalence and Mutual Recognition of Standards in WTO Law* (Kluwer Law International, Alphen aan den Rijn 2011)
Schutter, de 2012
O de Schutter 'Transborder Services and Social Dumping' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO. Trust, Distrust and Economic Integration* (Cambridge University Press, Cambridge 2012)
Seddon 2010
D Seddon (ed) *Guide to the Points-Based System* (JCWI, London 2010)
Self and Zutshi 2003
RJ Self and BK Zutshi 'Mode 4: Negotiating Challenges and Opportunities' inA Mattoo and A Carzaniga (eds) *Moving People to Deliver Services* (World Bank, Washington DC 2003)
Servais 1989
JM Servais 'The Social Clause in Trade Agreements: Wishful Thinking or an Instrument of Social Progress?' (1989) 128:4 *International Labour Review*
Sinclair and Grieshaber-Otto 2002
S Sinclair and J Grieshaber-Otto *Facing the facts: A guide to the GATS debate* (Canadian Centre for Policy Alternatives, Ottawa 2002)
Slotboom 2005
MM Slotboom *Do Different Treaty Purposes Matter for Treaty Interpretation? A Comparison of WTO and EC Law* (Cameron May, London 2005)
Snell 2009
J Snell 'Free Movement of Services and the Services Directive: The Legitimacy of the Case Law' in J van de Gronden (ed) *EU and WTO Law on Services. Limits to the Realization of General Interest Policies within the Services Markets?* (Wolters Kluwer, Alphen aan den Rijn 2009)
Snell 2011
J Snell 'Free Movement of Capital: Evolution as a Non-Linear Process' in P Craig and G de Búrca (eds) *The Evolution of EU law* (Oxford University Press, Oxford 2011)
Somerville 2013
W Somerville, 'The Politics and Policy of Skilled Economic Immigration under New Labour 1997-2010' in T Triadafilopoulos (ed) *Wanted and Welcome? Policies for Highly Skilled Immigrants in Comparative Perspective* (Springer, New York 2013)

Sørensen 2012
KE Sørensen 'Non-discriminatory restrictions on trade' in SE Gaines, B Egelund Olsen and KE Sørensen (eds) *Liberalising Trade in the EU and the WTO, A Legal Comparison* (Cambridge University Press, Cambridge 2012)
Spitzer 2004
F Spitzer *The Non-Violation Complaint in WTO Law* (Tenea, Berlin 2004)
Stark, Helmenstein and Prskawetz 1997
O Stark, C Helmenstein and A Prskawetz 'A Brain Gain with a Brain Drain' (1997) 45 *Institute for Advanced Studies Vienna Economics Series* 55
Steiner and Alston 2000
HJ Steiner and P Alston *International Human Rights in Context, Law Politics, Morals* (Oxford University Press, Oxford 2000)
Strøby-Jensen 2003
C Strøby-Jensen 'Neofunctionalism' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2003)
Tans 2008
S Tans 'Case report on Laval, 18 December 2007 (case C-341/05) and Viking, 11 December 2007 (case C-438/05)' (2008) 10 *European Journal of Migration and Law* 249
Tans 2009
S Tans 'The GATS Approach Towards Liberalization' (2009) 111 Centre for Trade and Economic Integration Working Paper, available online: <http://graduateinstitute.ch/home/research/centresandprogrammes/ctei/working_papers.html>
Tans 2011
S Tans 'The Unwanted Service Provider: Implementation of WTO and EU Liberalisation of Service Mobility in the Dutch Legal Order' (2011) 34:2 *Refugee Survey Quarterly*
Taselaar 2009
AP Taselaar 'Het Wetsvoorstel Modern Migratiebeleid' (2009) 4:22 *Journaal Vreemdelingenrecht*
Third World Network 2009a
Third World Network 'Necessity Test for Domestic Regulation of Services' Info Service on WTO and Trade Issues (2009) 21 October, available online: <http://www.twn.my>
Third World Network 2009b
Third World Network 'New Domestic Regulation Proposal to Raise Ambition Level in Services?' Info Service on WTO and Trade Issues (2009) 18 November 2009, available online: <http://www.twn.my>

Tjebbes 2008
M Tjebbes 'De kruistocht tegen werkgevers van illegalen. De boete bij overtreding van de Wet Arbeid Vreemdelingen' (2008) 8 *Migrantenrecht*
Tjebbes 2011
M Tjebbes 'Noot HvJEU, C-307/09, C-308/09, C-309/09 (Vicoplus e.a.)' (2011) 172 *Jurisprudentie vreemdelingenrecht*
Trebilcock and Howse 1996
MJ Trebilcock and R Howse 'The Fair Trade / Free Trade Debate: Trade, Labour, and the Environment' (1996) 16-1 *International Review of Law and Economics*
Trebilcock, Howse and Eliason 2013
M Trebilcock, R Howse and A Eliason *The Regulation of International Trade* (Routledge London, 2013)
Turnell 2001
S Turnell 'Core labour standards and the WTO' (2001) 0103 Macquarie Economic Research Paper
Twitchett and Twitchett 1981
C Twitchett and KJ Twitchett 'The EEC as a Framework for Diplomacy' in C Twitchett and KJ Twitchett (eds) *Building Europe. Britain's Partners in the E.E.C.* (Europa Publications, London 1981)
UN Millennium Project 2005
UN Millennium Project *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals* (Earthscan, New York 2005)
UNCTAD 2002
UNCTAD *Trade in Services and its Development Implications* Secretariat Note TD/B/COM.1/55, 20 December 2002
Urwin 2007
DW Urwin 'The European Community: From 1945 to 1985' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007)
Verhoosel 2002
G Verhoosel *National Treatment and WTO Dispute Settlement, Adjudicating the Boundaries of Regulatory Autonomy* (Hart Publishing, Oxford 2002)
Verschueren 2006
H Verschueren 'Sociale Zekerheid en Detachering binnen de Europese Unie. De Zaak Herbosch Kiere: Een Gemiste Kans in de Strijd tegen Grensoverschrijdende Sociale Dumping en Sociale Fraude' (2006) 3 *Belgisch Tijdschrift voor Sociale Zekerheid*

Verschueren 2007
H Verschueren 'De Europese Interne Markt en het Sociaalrechtelijk Statuut van Grensoverschrijdende Werknemers: een Trojaans Paard voor het Sociaal Recht van de Lidstaten?' in J Meeusen and G Straetmanes (eds) *Bedreigt de Europese Interne Markt de Sociale Welvaartsstaat?* (Intersentia, Antwerpen 2007)
Vidal 1998
JP Vidal 'The Effect of Emigration on Human Capital Formation (1998) 11:4 *Journal of Population Economics*
Vree, de and Jansen 1998
JK de Vree and M Jansen *The Ordeal of Unity. Integration and Disintegration in Modern Europe* (Amsterdam University Press, Amsterdam 1998)
Vries, de 2013
SA de Vries 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9:1 *Utrecht Law Review*
Waele, de
HFCJA de Waele *Rechterlijk Activisme en het Europees Hof van Justitie* (Boom Juridische uitgevers, The Hague 2009)
Walmsley and Winters 2002
TL Walmsley and LA Winters 'Relaxing the Restrictions on the Temporary Movement of Natural Persons: a Simulation Analysis' (2005) 20 *Journal of Economic Integration* 688
Warren and Findlay 2000
T Warren and C Findlay 'Measuring Impediments to Trade in Services' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000)
Warweigh-Lack 2007
A Warleigh-Lack 'Conclusion: The Future of the European Union' in M Cini (ed) *European Union Politics* (Oxford University Press, Oxford 2007)
Winters 2003
LA Winters, 'The Economic Implications of Liberalizing Mode 4 Trade', in A Mattoo and A Carzaniga (eds) *Moving People to Deliver Services* (World Bank, Washington DC 2003)
Winters 2007
LA Winters 'The Temporary movement of workers to provide services (GATS Mode 4)' in: A Mattoo, RM Stern and G Zanini (eds) *A handbook of international trade in services* (Oxford University Press, Oxford 2008)
Wissekerke, van 2011
E van Wissekerke *Regulier verblijfsrecht* (Boom Juridische uitgevers, The Hague 2011)

Witte, de 2007
B de Witte 'Setting the Scene: How did Services get to Bolkestein and Why?' (2007) 20 *European University Institute Working Papers*, available online: <http://cadmus.eui.eu/bitstream/handle/1814/6929/LAW_2007_20.pdf?sequence=1>

Wolfrum, Stoll and Feinäugle 2008
R Wolfrum, PT Stoll and C Feinäugle (eds) *Max Planck Commentaries on World Trade Law, WTO – Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Woodroffe 2002
J Woodroffe *GATS: A Disservice to the Poor* (World Development Movement, London 2002)

Wouters and Coppens 2008
J Wouters and D Coppens 'GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

WTO 2004
WTO Secretariat *A handbook on the WTO Dispute Settlement System* (Cambridge University Press, Cambridge 2004)

Wunsch-Vincent 2006
S Wunsch-Vincent 'The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US-Gambling' (2006) 5 *World Trade Review*

Young 2000
AM Young 'Where Next for Labor Mobility under the GATS?' in P Sauvé and RM Stern (eds) *GATS 2000, New Directions in Services Trade Liberalization* (The Brookings Institution, Washington DC 2000)

Zedillo, Messerlin and Nielson 2005
E Zedillo, P Messerlin and J Nielson *Trade for Development* (Earthscan, London 2005)

Zeithaml and Bitner 1996
VA Zeithaml and MJ Bitner *Services Marketing* (McGraw-Hill, New York 1996)

Zleptnig 2008
S Zleptnig 'The GATS and Internet-Based Services: Between Market Access and Domestic Regulation' in K Alexander and M Andenas (eds) *The World Trade Organization and Trade in Services* (Martinus Nijhoff Publishers, Leiden 2008)

Zweigert and Kötz 1998
K Zweigert and H Kötz *An Introduction to Comparative law* (Oxford University Press, Oxford 1998)

Media

NRC 'Chinezen bouwen babymelkpoeder fabriek in Assen' 24 April 2013 available online: <http://www.nrc.nl/nieuws/2013/04/24/chinezen-bouwen-babymelkpoederfabriek-in-assen/>
The Economist 'The Longest Journey' 2 November 2002 available online: <www.economist.com>

Interviews

Interview Philips (2 December 2010)
Interview CapGemini NL (3 December 2010)
Interview PriceWaterhouseCoopers (7 December 2010)
Interview Uitvoeringsinstituut Werknemersverzekeringen (UWV) (10 December 2010)
Interview Immigratie- en Naturalisatiedienst (IND) (1 February 2011)
Interview CapGemini UK (20 May 2011)
Interview FergusonSnell immigration advice (21 June 2011)
Interview Trades Union Congress (TUC) (21 June 2011)
Interview United Kingdom Border Agency (UKBA) (21 June 2011)
Interview Kingsley & Napley lawyers (22 June 2011)
Interview United Kingdom Home Office (29 June 2011)

Legislation and policy documents

United Nations

UN 1946 (ECOSOC)
: UN Economic and Social Council ECOSOC Resolution 13 (1946) UN Doc E/22

UN 1947
: Proceedings and Documents of United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire 1-2 July 1947, Vol. I, pp 1117-1118 (1947)

UN 2008a (CPC)
: UN Central Product Classification (CPC), 31 December 2008, UN ST/ESA/STAT/SER/M77/Ver.2

UN 2008b (ISIC)
: International Standard Industrial Classification of all economic activities (ISIC), 11 August 2008, UN St/ESA/STAT/SER.M/4/Rev.4

World Trade Organization

GATT/WTO Ministerial Declarations and related documents

GATT, Uruguay Ministerial Declaration, 20 September 1986, available online: <http://www.sice.oas.org/trade/Punta_e.asp>

WTO, Singapore Ministerial Declaration, 13 December 1996, WT/MIN(96)/Dec

WTO, Doha Ministerial Declaration, 14 November 2001, WT/MIN(01)/Dec/1

WTO, Draft Cancún Ministerial Text, 13 September 2003, JOB(03)/150/Rev.2

WTO, Hong Kong Ministerial Declaration, 18 December 2005, WT/MIN(05)/Dec

WTO, Geneva Ministerial Conference, Elements for Political Guidance,1 December 2011, WT/MIN(11)/W/2

WTO, Bali Ministerial Decision, 7 December 2013, WT/MIN(13)/Dec

WTO, Press Pack World Trade Organization 3rd Ministerial Conference Seattle, Briefing Note, 28 November 1999, available online: <www.wto.org>
WTO, Press Pack World Trade Organization 4th Ministerial Conference, Briefing Note, 9 November 2001, available online: <www.wto.org>

GATT documents

GATT (GNS) 1991a (Services Sectoral Classification List)
GATT Group of Negotiating on Services, Services Sectoral Classification List, 10 July 1991, MTN.GNS/W/120
GATT (GNS) 1991b
GATT Group of Negotiating on Services, Note on the Meeting of 10-25 July 1991, 28 August 1999, MTN.GNS/44
GATT (GNS) 1993a (Scheduling Guidelines 1993)
GATT Group of Negotiating on Services, Scheduling of Initial Commitments in Trade in Services: Explanatory Note, 3 September 1993, MTN.GNS/W/164
GATT (GNS) 1993b (Scheduling Guidelines 1993, addendum 1)
GATT Group of Negotiating on Services, Scheduling of Initial Commitments in Trade in Services: Explanatory Note, Addendum, 30 November 1993, MTN.GNS/W/164/Add.1
GATT 1994 (Decision MNP)
GATT, Decision on Movement of Natural Persons, MTN/FA III-7(h)

WTO documents

Council for Trade in Services

WTO (CTS) 1995
WTO Council for Trade in Services, Decision on Professional Services, 1 March 1995, S/L/3
WTO (CTS) 1998a (Accountancy Disciplines)
WTO Council for Trade in Services, Disciplines on Domestic Regulation in the Accountancy Sector, 17 December 1998, S/L/64
WTO (CTS) 1998b (Presence Natural Persons)
WTO Council for Trade in Services, Presence of Natural Persons (Mode 4), Background Note by the Secretariat, 8 December 1998, S/C/W/75
WTO (CTS) 1998c
WTO Council for Trade in Services, Decision on Disciplines relating to the Accountancy Sector, 14 December 1998, S/L/63

WTO (CTS) 1999a
WTO Council for Trade in Services, Note by the Secretariat, Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services, 1 March 1999, S/C/W/96

WTO (CTS) 1999b
WTO Council for Trade in Services, Decision on Domestic Regulations, 28 April 1999, S/L/70

WTO (CTS) 2001a (Scheduling Guidelines 2001)
WTO Council for Trade in Services, Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (ATS), 23 March 2001, S/L/92

WTO (CTS) 2001b
WTO Council for Trade in Services, Decision on the Guidelines for the scheduling of specific commitments under the General Agreement on Trade in Services (GATS), 23 March 2001, S/L/91

WTO (CTS) 2001c
WTO Council for Trade in Services, Guidelines and Procedures for the Negotiations on Trade in Services, 29 March 2001, S/L/93

WTO (CTS) 2005
Council for Trade in Services, Communication from the European Communities and its Member States Conditional Revised Offer, 29 June 2005, TN/S/O/EEC/Rev.1

WTO (CTS) 2006 (EU Consolidated GATS Schedule)
World Trade Organization, Council for Trade in Services, Communication from the European Communities and its Member States Consolidated GATS Schedule, 9 October 2006, S/C/W/273

WTO (CTS) 2009 (Presence Natural Persons)
WTO Council for Trade in Services, Presence of Natural Persons (Mode 4), Background Note by the Secretariat, 15 September 2009, S/C/W/301

Negotiating Group on Basic Telecommunications

WTO (NGBT) 1995
Draft Model Schedule of Commitments on Basic Telecommunications, Informal Note by the Secretariat, 12 April 1995, JOB 1311

Working Party on Domestic Regulation

WTO (WPDR) 2003
WTO Working Party on Domestic Regulation, Report on the Meeting Held on 1 July 2003, 22 September 2003, S/WPDR/M/22

WTO (WPDR) 2004
WTO Working Party on Domestic Regulation, Report on the Meeting Held on 24 September 2004, 15 November 2004, S/WPDR/M/27

WTO (WPDR) 2005a
WTO Working Party on Domestic Regulation, Communication from Canada Transparency Template – Canada's Revised Horizontal Mode 4 Offer, 20 May 2005, 25 May 2005, S/WPDR/W/33

WTO (WPDR) 2005b
WTO Working Party on Domestic Regulation, Report on the Meeting Held on 22 June 2005, 6 September 2005, S/WPDR/M/30

WTO (WPDR) 2005c
WTO Working Party on Domestic Regulation, Communication from Australia, Development of Disciplines on Domestic Regulation for the Legal and Engineering Sectors, 6 September 2005, S/WPDR/W34

WTO (WPDR) 2005d
WTO Working Party on Domestic Regulation, Communication from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Transparency Disciplines on Domestic Regulation in the Telecommunications Sector, 14 September 2005, S/WPDR/W/36

WTO (WPDR) 2006a
WTO Working Party on Domestic Regulation, Communication from Australia; Chile; Hong Kong, China; Korea; New Zealand and the separate customs territory of Taiwan, Pengu, Kinmen and Matsu, Article VI:4 disciplines – proposal for draft text JOB(06)193, 19 June 2006

WTO (WPDR) 2006b
WTO Working Party on Domestic Regulation, Draft Consolidated Text in the WPDR, 11 July 2006, JOB(06)/223

WTO (WPDR) 2006c
WTO Working Party on Domestic Regulation, Communication from the United States, Outline of the US position on a Draft Consolidated Text in the WPDR, 11 July 2006, JOB(06)/223

WTO (WPDR) 2006d
WTO Working Party on Domestic Regulation, Consolidated Working Paper – Note by the Chairman, JOB(06)/225, 12 July 2006

WTO (WPDR) 2008a
WTO Working Party on Domestic Regulation, Report of the meeting held on 16 June 2008, 18 June 2008, S/WPDR/M/38

WTO (WPDR) 2008b
WTO Working Party on Domestic Regulation, Annotated Agenda by the Chairperson, Room Document circulated on 3 July 2008 (on file author)

WTO (WPDR) 2008c
WTO Working Party on Domestic Regulation, Report of the meeting held on 26 November 2008, 10 December 2008, S/WPDR/M/39

WTO (WPDR) 2009a
WTO Working Party on Domestic Regulation, Informal Note by the Chairman, Draft Disciplines on Domestic Regulation pursuant to GATS Article VI :4, second revision, informal Note by the Chairman, Room Document 2160, 20 March 2009
WTO (WPDR) 2009b
WTO Working Party on Domestic Regulation, Report on the Meeting Held on 12 May 2009, 1 April 2009, S/WPDR/M/40
WTO (WPDR) 2014
WTO Working Party on Domestic Regulation, Report on the Meeting Held on 17 September 2014, 28 October 2014, S/WPDR/M/62

Trade Negotiations Committee

WTO (TNC) 2008 (Services Signalling Conference)
WTO Trade Negotiations Committee, Services Signalling Conference, Report by the Chairman of the Trade Negotiations Committee, 30 July 2008, JOB(08)/93

General Council

WTO (GC) 2014
WTO General Council, Agreement on Trade Facilitation, 28 November 2014, WT/L/940

Speeches and press releases

WTO News 30 September 1997, press/78
Speech WTO Director General Roberto Azevedo of 12 February 2014
Speech WTO Director General Roberto Azevedo of 8 November 2014

International Labour Organization

ILO (GB) WPSDL 1999
ILO Governing Body Working Party on the Social Dimensions of the Liberalization of International Trade, Progress report on the country studies on the social impact of globalization, March 1999, Session 274, GB.274/WP/SDL/2

ILO (GB) WPSDL 2000
ILO Governing Body Working Party on the Social Dimensions of the Liberalization of International Trade, Future activities of the Working Party, March 2000, Session 277, GB.277/WP/SDL/1

European Union

International Agreements and Decisions

Agreement establishing an Association between the European Economic Community and Turkey, Ankara 12 September 1963 OJ (1964) 3687/64

Additional Protocol and Financial Protocol signed on 23 November 1970, annexed to the Agreement establishing the Association between the European Economic Community and Turkey and on measures to be taken for their entry into force - Final Act - Declarations OJ (1964) L293/4

Decision No 2/76 of the Association Council of 20 December 1976 on the implementation of Article 12 of the Ankara Agreement

Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association

Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, Dutch Treaty Series 1985 no 102

Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders

Agreement on the European Economic Area OJ (1994) L1/3

Partnership Agreement between the members of the African, Caribbean and Pacific group of states of the one part, and the European Community and its Member States of the other part, Cotonou 15 December 2000, entry into force 1 April 2003 OJ (2000) L317/15

Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons OJ (2002) L114/6

Act of Accession concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union OJ (2003) L236/46

Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part OJ (2008) L289/I/3

Treaty between the Member States of the European Union and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union OJ (2012) L112/10

Proposal by the European Union 'Plurilateral Service Agreement Draft Text Provisions, Explanatory Note' (2013) available online: <http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152687.pdf>

Secondary legislation

Council of the European Communities, General Programme for the abolition of restrictions on freedom of services 18 December 1961 OJ (1962) No 2/32

Council of the European Communities, General Programme for the abolition of restrictions on freedom of establishment 18 December 1961 OJ (1962) No 2/36

Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health OJ (1964) 56/850

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services OJ (1973) L172/14

Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty OJ (1988) L178/5

Council Directive 90/364/EEC of 28 June 1990 on the rights of residence for persons of sufficient means OJ (1990) L180/26

Council Directive 90/365/EEC of 28 June 1990 on the rights of residence for employees and self-employed who have ceased their occupation activity OJ (1990) L180/28

Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship OJ (1991) L206/19

Council Directive 93/96/EEC of 29 October 1993 on the rights of residence for students OJ (1993) L317/59

Council Decision 800/94 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) OJ (1994) L336/1

Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particularly those established under the auspices of the World Trade Organization OJ (1994) L348/71

Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ (1997) L18/1

Council Regulation 539/2001/EC of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ (2001) L81/1

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ (2003) L251/12

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents OJ (2004) L16/44

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States OJ (2004) L158/77

Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service OJ (2004) L375/12

Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research OJ (2005) L289/15

Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ (2006) L376/36

Regulation 562/2006/EC of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders OJ (2006) L105/1

Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJ (2009) L155/17

Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems OJ (2009) L284/1

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country workers legally residing in a Member State OJ (2011) L343/1

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ (2014) L98/375

Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer OJ (2014) L157/1

Commission proposals

Commission Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services COM (1991) 230, final

Commission proposal for a Directive of the European Parliament and of the Council on the posting of workers who are third-country nationals for the provision of cross-border services and Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community COM (1999) 3, final

Commission proposal for a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM (2001) 386, final

Commission proposal for a Directive of the European Parliament and of the Council on services in the internal market COM (2004) 2, final

Commission proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer COM (2010) 378, final

Commission proposal for a directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing COM (2013) 151, final

Institution papers and communications

European Commission 1985
Commission of the European Communities White Paper 'Completing the Internal Market' COM (1985) 310 final, 14 June 1985

European Commission 1988
Commission action in respect of the application of Article 48(4) of the EEC Treaty of 7 January 1988, Freedom of movement and access to employment in the public service of the Member States OJ (1988) C72/2

European Commission 1989
Commission Opinion on Turkey's Request for Accession to the Community SEC (1989) 2290

European Commission 1997
European Commission 'Communication of the Commission to the European Council Action Plan for the Single Market' CSE (1997) 1, Final

European Commission 2000
European Commission 'Communication from the Commission to the Council and the European Parliament, An Internal Market Strategy for Services' COM (2000) 888, final

European Commission 2001
European Commission 'Communication from the Commission – Services of general interest in Europe' OJ (2001) C17/4

European Commission 2002
European Commission 'Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services' COM (2002) 441, final
European Commission 2004
European Commission Green Paper 'an EU Approach to Managing Economic Migration' COM (2004) 811, final
European Commission 2005
European Commission 'Policy Plan on Legal Migration' COM (2005) 669, final
European Council 2005
European Council, Joint Statement by the Council and the representatives of the Governments of the Member States meeting with the Council, the European Parliament and the Commission, *The European Consensus on Development*, Doc. 14820/05, 22 November 2005
European Commission 2007
European Commission 'Commission's Handbook on Implementation of the Services Directive, Luxembourg: Office for Official Publications of the European Communities' (Office for Official Publications of the European Communities Luxembourg 2007)
European Commission 2010
European Commission 'Communication from the Commission, Europe 2020, A Strategy for Smart, Sustainable and Inclusive growth' COM (2010) 2020, final

Speeches

Commissioner for Internal Market and Services, Statement on the Revised Proposal for the Services Directive, Speech/06/220, 4 April 2006

Other

Bulletin of the European Communities (summary of the Tindemans and the Three Wise Men reports) 11-1979

Lisbon European Council meeting, Presidency Conclusions, 23 and 24 March 2000

Netherlands

Legislation

Wet van 27 November 1968, houdende regelen inzake een minimumloon en een minimum vakantiebijslag (minimum wage Act) Stb (1937) 801

Besluit van 10 november 2005 tot wijziging van het Besluit uitvoering Wet arbeid vreemdelingen en van het Vreemdelingenbesluit 2000 Stb (2005) 577

Wet van 22 maart 2007, houdende regels omtrent een basisregister van ondernemingen en rechtspersonen (commerce register Act) Stb (2007) 153

Regeling van de Minister van Sociale Zaken en Werkgelegenheid of 8 February 2010 tot Vaststelling van de Beleidsregels boeteoplegging Wet arbeid vreemdelingen (Implementation Guidelines Fines AEA) AI/AMF/MO/10/1335

Beleidsregels van de Minister van Economische Zaken of 13 October 2010 houdende een puntensysteem voor de advisering over de toelating van vreemdelingen als zelfstandig ondernemer in Nederland (Policy Guidelines self-employed aliens) WJZ/9201649

Wet modern migratiebeleid en het Besluit modern migratiebeleid Stb (2013) 165

Policy documents

Dutch Parliament, *Kamerstukken II*, 1993/94, 23 574
Dutch Parliament, *Kamerstukken II*, 2008/09, 32 052
Dutch Parliament, *Kamerstukken II*, 2008/09, 32 058
Dutch Parliament, *Kamerstukken II*, 2009/10, 17 050
Dutch Parliament, *Kamerstukken II*, 2009/10, 32 052
Dutch Parliament, *Kamerstukken II*, 2012/13, 33 183

Dutch Ministry of Justice 2001
Dutch Ministry of Justice *Begrippenlijst Vreemdelingenbeleid* (Ministerie van Justitie, Directie Voorlichting The Hague 2001)

Raad van State 2005
Raad van State, 14 October 2005, Advice W 12.05.0419/IV, Annex to *Stcrt* 13 December 2005, nr 242

Raad van State 2006
Raad van State 'Year Report' (2006) available online: <https://www.raadvanstate.nl/ publicaties/jaarverslagen.html>

Dutch Ministry of Safety and Justice 2007
Dutch Ministry of Safety and Justice, government notice 'Naar een modern migratiebeleid' (2007) ve06000709

United Kingdom

Legislation

The Immigration (European Economic Area) Regulations 2000, SI 2000/2326

The Immigration (Swiss Free Movement of Persons) (No. 3) Regulations 2002, SI 2002/ 1241

The Immigration (European Economic Area) Regulations 2006, SI 2006/1003

Amending statements to the Immigration Rules, HC 59, 28 June 2010

Amending statements to the Immigration Rules, HC 96, 15 July 2010

Accession of Croatia (Immigration and Worker Authorisation) Regulations 2013, SI 2013/ 1460

UK Home Office, Statement of Relevant Requirements which must be met for the purpose of regulations 9 and 10 of the Croatian Regulations, April 2014

Draft Visitor Guidance (E) v.final 14 April 2014

Draft Visitor Rules v.final 6 April 2014

Statement of Changes in Immigration Rules, HC 1025, 26 February 2015

Policy documents

Department of Trade and Industry 1998
UK Government Department of Trade and Industry White Paper 'Our Competitive Future: Building the Knowledge Driven Economy' Cm (1998) 4176

Home Office 2002
UK Government Department Home Office White Paper 'Secure Borders, Safe Haven – Integration with Diversity in Modern Britain' Cm (2002) 5387
Home Office 2005a
UK Government Department Home Office 'Controlling our borders: Making migration work for Britain, Five year strategy for asylum and immigration' Cm (2005) 6472
Home Office 2005b
UK Government Department Home Office Consultation Paper 'Selective Admission: Making Migration Work for Britain' July 2005
Home Office 2005c
UK Government Department Home Office Consultation Paper 'A Consultation on Establishing a Migration Advisory Committee' November 2006
Home Office 2006a
UK Government Department Home Office Command Paper 'A Points-Based System: Making Migration Work for Britain' Cm (2006) 6471
Home Office 2006b
UK Government Department Home Office Consultation Paper 'A Consultation on a New Charging Regime for Immigration and Nationality Fees' October 2006
Home Office 2010
UK Government Department Home Office UK Border Agency Consultation Paper 'Limits on Non-EU Economic Migration' June 2010
House of Commons 2009
House of Commons, Home Affairs Committee 'Managing Migration: the Points Based System' thirteenth report of session 2008-09, volume 1
House of Lords 2012
House of Lords, European Union Commission 'The EU's Global Approach to Migration and Mobility' 18 December 2012, HL Paper 91

Coalition Programme for government, 20 May 2010, available online: <https://www. gov.uk>

Case law

GATT Panels

German – Import Duties on Starch and Potato Flour W.9/178 – 3S/77, 16 February 1955
Japan – Restrictions on Imports of Certain Agricultural Products L/6253 – 35S/163, 2 February 1988
Japan – Trade in Semi-Conductors (Japan – Semi-Conductors) L/6309 – BISD 35S/116, 4 May 1988
European Economic Community – Regulation on Imports of Parts and Components (*EEC – Parts and Components*) L/6657 37S/132, 16 May 1990

WTO Dispute Settlement Bodies

United States – Taxes on Automobiles (US – Taxes on Automobiles) DS 31/R, 11 October 1994
United States – Standards for Reformulated and Conventional Gasoline (US – Gasoline) WT/DS2/AB/R and WT/DS4/AB/R, 20 May 1996
Japan – Taxes on Alcoholic Beverages (*Japan – Alcoholic Beverages II*) WT/DS8/R, WT/DS10/R, WT/DS11/R, 11 July 1996
United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear) WT/DS24/R, 10 February 1997
United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear (US – Underwear) WT/DS24/AB/R, 10 February 1997
Brazil – Measures Affecting Dessicated Coconut (Brazil – Dessicated Coconut) WT/DS22/AB/R, 20 March 1997
European Communities – Regime for the Importation, Sale and Distribution of Bananas (*EC – Bananas III*) WT/DS27/AB/R, 25 September 1997
European Communities – Measures Concerning Meat and Meat Products (*EC – Hormones*) WT/DS26/AB/R, 13 February 1998
Japan – Measures Affecting Consumer Photographic Film and Paper (Japan – Film) WT/DS44/R, 22 April 1998

European Courts

European Court of Justice

General Court

Dutch case law

Rechtbank

Afdeling Bestuursrechtspraak van de Raad van State

UK case law

Court of Appeal (England and Wales)

High Court (England and Wales)

House of Lords / Supreme Court

Index

Curriculum Vitae

Simon Tans (Leusden 1978) obtained his master Dutch law and his master international and European law at the University of Amsterdam. He started working as a lecturer at the international and European law department of the Radboud University Nijmegen in 2006. After two years of lecturing and conducting research he started working on this PhD at the Centre for Migration Law at the same university. Additionally, he worked as a Junior Programme Officer for the Services Programme and the Dispute Settlement Programme at the International Centre for Trade and Sustainable Development in Geneva (ICTSD). After his time at the ICTSD he remained in Geneva as a visiting researcher at the Graduate Institute of International Studies. During his visiting scholarship he wrote a working paper in the Graduate Institute's Centre for Trade and Economic Integration series. He participated in several conferences, including the first Dean Maxwell and Isle Cohen Doctoral Seminar in International Law. In 2011 he organized and participated in the expert meeting 'Liberalisation of Service Mobility, Immigration Regulations and National Labour Market Policies', a cooperation between the Centre For Migration Law and the Graduate Institute of International Studies. While still working on this PhD he returned to the international and European law department of the Radboud University Nijmegen as an assistant professor, the position he currently holds. He has published in several scientific journals, including the *European Journal of Migration and Law* and the *Refugee Survey Quarterly*, and has contributed a chapter to the edited book: *Toepasselijk arbeidsrecht over de grenzen heen*. In addition, he has lectured on various international and European law topics throughout the bachelor and master programme of the Radboud University.